Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

ILLINOIS COMMERCE COMMISSION, *et al.*,

*Petitioners*,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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159 pp

## QUESTIONS PRESENTED

### I.

Whether the court of appeals erred in holding that a state constructively waived its constitutional sovereign immunity by not forbidding a state public service commission from fulfilling regulatory responsibilities under the Telecommunications Act, where Congress lacks the constitutional power under the Commerce Clause to condition a state's performance of those responsibilities on waiver of the state's immunity and after *College Savings* waivers of immunity must be deliberate, express waivers made by the state itself.

### II.

Whether the court of appeals erred in holding that the *Ex parte Young* exception to the Eleventh Amendment applied to the conduct of state public service commissions in arbitrating, reviewing, and approving interconnection agreements under the Telecommunications Act of 1996, where Congress did not authorize suits against state commissioners under the Act, the conduct complained of is completed and will not recur, and the conduct complained of is not alleged to violate the Constitution.

## PARTIES TO THE PROCEEDING

The petitioners are the Illinois Commerce Commission and Richard L. Mathias, Terry S. Harvill, Edward C. Hurley, Ruth K. Kretschmer, and Mary Frances Squires, in their official capacities as Commissioners of the Illinois Commerce Commission.

The respondents are MCI Telecommunications Corp., MCIMetro Access Transmission Services, Inc., the Illinois Bell Telephone Company d/b/a Ameritech Illinois; the United States of America, the Federal Communications Commission; the Public Service Commission of Wisconsin and Ave M. Bie, John H. Farrow, Joseph P. Mettner, in their official capacities as commissioners of the Public Service Commission of Wisconsin; and Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin.

## TABLE OF CONTENTS

Page

Questions Presented ..... i

Parties to the Proceeding ..... ii

Table of Contents ..... iii

Table of Authorities ..... v

Opinions Below ..... 1

Statement of Jurisdiction ..... 1

Constitutional And Statutory Provisions Involved ..... 2

Statement Of The Case ..... 2

A. Telecommunications Act of 1996 ..... 3

B. The MCI/Ameritech Illinois Interconnection Agreement ..... 4

C. The Proceedings Below ..... 5

D. Subsequent Events ..... 8

Reasons For Granting The Writ ..... 8

I. The Decision Below is Contrary to *College Savings*, Supreme Court Precedent and the Constitution ..... 11

A. Congress Cannot Use Its Commerce Power to Condition a State's Regulatory Responsibilities in the Act on Waiver of the State's Sovereign Immunity ..... 11

B. The Seventh Circuit's Constructive Waiver Holding Is Contrary to *College Savings* and Conflicts With the Sixth Circuit's Decision in *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000).....14

C. The Act Does Not Inform States With the Clarity Required by This Court that Performing the Regulatory Responsibilities Given to Them Will Result in Waiver of Their Sovereign Immunity.....19

II. The Decision Below Conflicts With *Ex Parte Young*, 209 U.S. 123 (1908) .....20

A. The Lower Court Erred in Determining Congress Intended for *Ex parte Young* Actions to Be Brought Under the Act Against Individual State Commissioners.....20

B. The Court of Appeals Erred in Finding the *Ex parte Young* Exception Applicable Because the Exception Applies Only to Ongoing Constitutional Violations by State Officials .....23

C. The Court of Appeals Erred in Finding that the ICC's Arbitration Decision Incorporated into the Carriers' Agreement Is an Ongoing Violation.....28

Conclusion.....30

## TABLE OF AUTHORITIES

**Cases:**

*Alden v. Maine*, 119 S. Ct. 2240 (1999).....6, 12, 24-26

*AT&T Comm. of South Cent. States v. BellSouth Telecommunications, Inc.* 43 F.Supp.2d 593 (M.D. La. 1999).....10

*AT&T Corp. v. Iowa Utilities Bd.*, 119 S.Ct. 721 (1999).....3, 9, 17, 18, 20

*Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).....13

*BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Serv., Inc.*, 97 F.Supp.2d 1263 (N.D. Ga. 2000).....10

*Breard v. Greene*, 118 S. Ct. 1352 (1998).....29

*City of Edwardsville v. Illinois Bell Tel. Co.*, 310 Ill. 618 (1924).....18

*Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).....5

*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999).....*passim*

*Edelman v. Jordan*, 415 U.S. 651 (1974).....28

*Ex parte Young*, 209 U.S. 123 (1908).....*passim*

*Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199 (1999).....6

*Golden State Transit v. Los Angeles*, 493 U.S. 103 (1989).....24

*GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000).....10, 14, 18, 19

*Ingalls Shipbuilding v. Director*, OWCP, 117 S. Ct. 796 (1997).....22

*Lane v. Pena*, 518 U.S. 187 (1996).....19

*Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).....27

*Lett v. Magnant*, 965 F.2d 251 (7th Cir. 1992).....28

*Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986).....2, 17

*MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 183 F.3d 558 (7th Cir. 1999).....*passim*

*New Orleans Pub. Serv. v. New Orleans, Inc.*, 491 U.S. 350 (1989).....12

*Papasan v. Allain*, 478 U.S. 266 (1986).....26,28

*Parden v. Terminal Railway of Alabama Docks Dep't*, 377 U.S. 184 (1964).....12, 13, 14, 18

*Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981).....16, 23, 27, 28

*Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) ..... 14, 15, 16

*Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) ..... 5

*Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998) ..... 29

*Seminole Tribe v. Florida*, 517 U.S. 44 (1996) .. 8, 20, 22, 25

*South Dakota v. Dole*, 483 U.S. 203 (1987) ..... 15, 16

*Texas Office of Public Utility Counsel v. Federal Communications Comm'n*, 183 F.3d 393 (5th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3747 ..... 9

*United States v. Lopez*, 514 U.S. 549 (1995) ..... 11

*United States v. Morrison*, 120 S. Ct. 1740 ..... 12

*United States v. Nordic Village*, 503 U.S. 30 (1992) .... 19, 20

*Wisconsin Bell v. Public Service Commission of Wisconsin*, 567 F.Supp.2d 710 (W. D. Wis. 1999) ..... 6, 19

**Statutes:**

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 1331 ..... 5

47 U.S.C. § 151 ..... 2

47 U.S.C. § 152(a) ..... 2

47 U.S.C. § 152(b) ..... 2, 9, 17

47 U.S.C. § 251 .....3, 9

47 U.S.C. § 251(a), (b) .....3

47 U.S.C. § 251(c) .....4

47 U.S.C. § 251(d)(3) .....17

47 U.S.C. § 251(e)(1) .....17

47 U.S.C. § 252 .....2, 3, 9, 10

47 U.S.C. § 252(a) .....4

47 U.S.C. § 252(e)(3) .....25

47 U.S.C. § 252(e)(5) .....15, 21, 22

47 U.S.C. § 252(e)(6) .....*passim*

47 U.S.C. § 261(b), (c) .....17

47 U.S.C. § 276(c) .....17

47 U.S.C. § 402 .....21

220 ILCS 5/10-201 .....22

Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 1996
§ 601 .....2, 17

**Constitutional Provisions:**

The Commerce Clause, U.S. art. I, § 8 cl. 3
.....2, 11, 12, 13, 14

The Spending Clause, U.S. art. I, § 8 cl. 1 .....2, 13

The Supremacy Clause, U.S. art. VI, cl. 2 .....2, 24

U.S. Const amend XI .....*passim*

**Rules:**

Fed. R. App. P. 15(a) ..... 22

155 Il. 2d R. 335(a) ..... 22

## APPENDIX

Appendix A – Opinion In The United States Court of Appeals For The Seventh Circuit, Dated July 24, 2000 ..... 1a

Appendix B – Opinion In The United States Court Of Appeals For The Seventh Circuit, Decided February 10, 1999 ..... 56a

Appendix C – Memorandum Opinion And Order In The United States District Court, Northern District Of Illinois, Eastern Division, Dated March 30, 1998 ..... 75a

Appendix D – Constitutional Provisions And Statutes ..... 107a

The Illinois Commerce Commission and its Commissioners (collectively "ICC") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case. This petition for certiorari seeks review of the court of appeals' decision holding that Illinois constructively waived its constitutional sovereign immunity by not forbidding the ICC from carrying out its responsibilities under the Act and by allowing the ICC to continue to regulate telephone service in the state. It also seeks review of the court's decision holding that the *Ex parte Young* doctrine afforded an alternative basis for lifting the eleventh amendment bar.

## OPINIONS BELOW

The opinion of the Court Appeals for the Seventh Circuit in *MCI Telecommunications Corp. v. Illinois Commerce Comm'n* is reported at 222 F.3d 323 and is reprinted in the Appendix at pages 1a-54a. The court of appeals' opinion prior to rehearing is reported at 183 F.3d 558, and is reprinted in the Appendix at pages 55a-73a. The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is unreported, and is reprinted in the Appendix at pages 74a-104a.

## STATEMENT OF JURISDICTION

The judgment of the court of appeals in *MCI* was entered on July 24, 2000. On October 23, 2000, Justice Stevens granted the ICC a 14-day extension of time for filing a petition for a writ of certiorari through November 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

1. The Commerce Clause, U.S. art. I, § 8 cl. 3 (Pet. App. 105a).
2. The Spending Clause, U.S. art. I, § 8 cl. 1 (Pet. App. 105a).
3. The Supremacy Clause, U.S. art. VI, cl. 2 (Pet. App. 105a)
4. U.S. Const amend. XI (Pet. App. 105a-106a).

STATUTES

1. Section 252 of the Telecommunications Act of 1996 (Pet. App. 106a-117a).
2. Section 601 of the Telecommunications Act of 1996 (Pet. App. 118a).

## STATEMENT OF THE CASE

For nearly a century, states alone regulated telephone service within their boundaries. The Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, codified a system of dual state and federal regulation over telephone service. In general, it granted the Federal Communications Commission ("FCC") jurisdiction over all interstate and foreign communications by wire or radio and expressly reserved jurisdiction over intrastate communications by wire or radio to the States. *Id.* § 152(a),(b); *see generally Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986).

### A. Telecommunications Act of 1996

On February 8, 1996, Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) ("1996 Act" or "Act"), which amended the Communications Act of 1934. The Act alters the traditional federal-state jurisdictional balance, creating in sections 251 and 252 what the FCC has termed "parallel jurisdiction." *In re* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 13042 (1996), at ¶ 85. Sections 251 and 252 grant the FCC jurisdiction over certain intrastate aspects of telecommunications and the states jurisdiction over certain aspects of interstate telecommunications. In addition, the Act expressly preserves existing state access and interconnection regulations and expressly allows states to prescribe additional regulations so long as those regulations are not inconsistent with the Act. 47 U.S.C. §§ 251-52. Moreover, the Act explicitly forecloses implied preemption of state law in § 601. More generally, the Act preserves the dual jurisdiction federal-state regulatory model, where not expressly modified. *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721, 731 n.8 (1999) ("*Iowa Utilities*")

Acknowledging the vast knowledge and expertise states have with respect to local telephone markets, Congress gave states a critical role in implementing portions of the Act and opening local telephone markets to competition. The Act imposes general duties on all telecommunications carriers and further obligations on all local exchange carriers ("LEC"). 47 U.S.C. § 251(a), (b). Recognizing that new entrants to the local telephone market would not be able to

rapidly and efficiently duplicate the facilities developed over time by incumbent LECs, Congress imposed additional obligations on incumbent LECs, like Ameritech Illinois, to, among other things, allow new entrants to "interconnect" with their networks, gain unbundled access to discrete elements of their networks, and purchase their telecommunications services for resale at wholesale prices. *See id.* § 251(c). The means of obtaining interconnection, unbundled access, and resale are through agreements negotiated in accordance with section 252 of the Act.

### B. The MCI/Ameritech Illinois Interconnection Agreement.

MCI and Ameritech Illinois attempted to negotiate a binding interconnection agreement, but were unable to agree on all of its rates, terms and conditions. As provided for by section 252(b) of the federal Act, MCI filed a petition with the ICC seeking arbitration of various open, unresolved issues. The ICC resolved the open issues, setting forth its findings and conclusions in a written arbitration decision. MCI and Ameritech Illinois incorporated the arbitration decision's findings and conclusions into the agreement. They combined the arbitration decision with the predominantly negotiated rates, terms and conditions, and submitted the resulting interconnection agreement to the ICC for approval as required by section 252(a). On April 28, 1997, the ICC approved the interconnection agreement under section 252(e)(2). Pet. App. 12a.

### C. The Proceedings Below

Dissatisfied with several aspects of the ICC's decision, however, MCI filed an action in federal district court against the ICC and Ameritech Illinois seeking review of the ICC's order pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. Ameritech Illinois filed a cross-claim against the ICC and a counterclaim against MCI taking issue with one aspect of the decision. The ICC immediately moved to dismiss all claims against it on Eleventh Amendment sovereign immunity grounds. The ICC maintained that the claims against it were in reality claims against Illinois and, therefore, barred by the Eleventh Amendment. The district court denied the motions, determining that the ICC constructively waived Illinois' sovereign immunity or, in the alternative, that the *Ex party Young* exception to the Eleventh Amendment allowed the action against the Commissioners. Pet. App. 14a-16a.

The ICC appealed to the Seventh Circuit.[1] On February 10, 1999, the Seventh Circuit in *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 183 F.3d 558 (7th Cir. 1999) (Pet. App. 55a), affirmed the district court's denial of the motions to dismiss. The Seventh Circuit held, as did the district court, that the ICC constructively waived its Eleventh

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1 Jurisdiction in the court of appeals was based upon the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). *See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (holding appeal of district court order denying a claim of Eleventh Amendment immunity permissible under the collateral order doctrine).

Amendment immunity by voluntarily choosing to carry out the arbitration and approval functions as provided in section 252 of the Act while fully aware that the Act provides for federal review of such actions. Pet. App. 73a. Having found constructive waiver, the Seventh Circuit declined to address whether the *Ex parte Young* exception to the Eleventh Amendment offered an additional basis for jurisdiction. *Id.* at 73a n.4. The ICC filed a timely petition for rehearing and rehearing *en banc*.

On June 23, 1999, this Court issued *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999), *Alden v. Maine*, 119 S. Ct. 2240 (1999), and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199 (1999), three opinions involving state sovereign immunity. Two days later, on June 25, 1999, the Seventh Circuit granted the petition for rehearing, requested supplemental briefs addressing the applicability of the three opinions, and restored the case to the calendar for oral argument. [2]

On rehearing, the Seventh Circuit affirmed its earlier decision. *MCI v. Illinois Commerce Comm'n*, No. 98-2127 (7th Cir. July 24, 2000) (Pet. App. 1a). The court began by restating its previous holding that the 1996 Act contemplates

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2 Shortly after the *MCI* court granted rehearing, several appeals were taken from Judge Crabb's decision in *Wisconsin Bell v. Public Service Commission of Wisconsin*, 57 F.Supp.2d 710 (W.D. Wis. 1999), granting the Wisconsin Public Service Commission's motions to dismiss based on the Eleventh Amendment. The court consolidated the Wisconsin appeals with the *MCI* appeal for purposes of argument and disposition.

that state commissions be parties to suits in federal district courts under 252(e)(6) of the Act. Pet. App. 28a. Next, the court rejected the idea that Congress abrogated the States' sovereign immunity, but the court affirmed its previous holding that state commissions constructively waive their immunity by performing the responsibilities given to them in the Act. The court concluded that constructive waiver of sovereign immunity under the commerce clause is still valid after *College Savings*. *Id.* at 31a-35a. The court then affirmed its previous conclusion that Congress solicited a waiver of states' sovereign immunity as a condition for fulfilling their responsibilities under the Act, finding the structure of the Act provided the requisite clarity. *Id.* at 35a-38a. In the court's view, "Congress has expressed unmistakably that, under the 1996 Telecommunications Act, states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court." *Id.* at 38a. Finally, the court went on to find that Illinois accepted that condition by failing to forbid the ICC from performing the responsibilities given to it in the Act. *Id.* at 38a-45a. In reaching its decision, however, the court expressly acknowledged that its constructive waiver holding conflicted with the view of the Court of Appeals for the Sixth Circuit. *Id.* at 45a n.12.

Besides finding a constructive waiver, the court applied the *Ex parte Young* exception to the Eleventh Amendment. The court found that because the carriers' claims alleged ongoing violations and requested prospective relief, they came within the *Ex parte Young* exception. Pet. App. 45a-47a. Specifically, in the court's view, since the ICC's

arbitration determinations "are still in place" and the carriers were seeking an injunction to "conform the [Commissioners'] future actions, including their continuing enforcement of the challenged determinations, with federal law," the carriers met the requirements for application of the exception. *Id.* at 47a. The court also held that *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), did not preclude the carriers' *Ex parte Young* suit against the Commissioners. The court pointed out that "[s]ection 252 of the Act does not create a 'detailed remedial scheme' that manifests Congress' intent to limit the scope of statutory remedies available to parties aggrieved by the commissioners' interconnection determinations." Pet. App. 48a. Unlike the judicial enforcement scheme in the Indian Gaming Regulatory Act, the court remarked, Congress in section 252(e)(6) of the Act did not limit a federal court's remedial powers. *Id.* at 50a-51a.

### D. Subsequent Events

After the Seventh Circuit issued its mandate, the parties returned to the district court. On October 10, 2000, MCI and Ameritech Illinois moved in the district court to voluntarily dismiss all of their claims. On October 13, 2000, the district court granted their motion and dismissed the case. On October 23, 2000, the ICC moved the Seventh Circuit to recall its mandate and vacate its judgment. The motion is pending.

## REASONS FOR GRANTING THE WRIT

The 1996 Act is a major piece of federal legislation that "fundamentally restructures local telephone markets" and "profoundly affects a crucial segment of the economy worth

tens of billions of dollars." *Iowa Utilities*, 119 S. Ct. at 726, 738. The Act's goals of fostering competition in the local markets, and furthering competition in the long-distance market, aim to bring lower prices, better quality service and technological innovations to all telephone subscribers. To implement its provisions, the Act enlists the states and the FCC in a cooperative effort. Thus, the issues implicated by the Act are of substantial local and national importance.

The Court already accepted two cases involving the 1996 Act. In the first, *Iowa Utilities*, the Court resolved a jurisdictional dispute over the division of authority between state commissions and the FCC in implementing certain portions of the local competition provisions (*i.e.*, sections 251 and 252) of the Act. The Court generally upheld the FCC's rulemaking authority to adopt rules to guide the states in performing their responsibilities under the Act. The Court also reaffirmed that the substantive jurisdictional division of authority between the states and the FCC set forth in 47 U.S.C. § 152(b) continues to operate in the absence of specific contrary provisions. *Iowa Utilities*, 119 S. Ct. at 731 n.8. In addition, earlier this year, the Court granted certiorari in *Texas Office of Public Utility Counsel v. Federal Communications Comm'n*, 183 F.3d 393 (5th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3747 (June 5, 2000) (No. 99-1244), a case involving review of the FCC's efforts to implement the universal service provisions of the Act.

This case, like the other two, implicates the Act--specifically section 252(e)(6), the judicial review provision. In fact, this case and the *Iowa Utilities* case are bookends: one involves the beginning of the implementation process, the other its conclusion. In *Iowa Utilities*, as mentioned

above, the issue was jurisdiction: who had primary authority, the state commissions or the FCC, to implement sections 251 and 252 of the Act. In this case, and the other cases brought against states under section 252(e)(6), the issue is whether states must be made parties to suits for review of their determinations made under section 252, and if so, whether the Eleventh Amendment stands as a bar to such review in federal court.

The importance of constitutional sovereign immunity to the States cannot be doubted. The Seventh Circuit's constructive waiver holding conflicts with this Court's recent decision in *College Savings*. In addition, as the Seventh Circuit acknowledged, its constructive waiver holding conflicts with the Sixth Circuit's view in *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000). Furthermore, the court's *Ex parte Young* holding was erroneous and impermissibly enlarges the narrow, judicially-created exception in derogation of Illinois' constitutional sovereign immunity.

Many states have raised the Eleventh Amendment as a bar to suits brought against them under section 252(e)(6) of the Act. *E.g.*, *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Serv., Inc.*, 97 F. Supp.2d 1263, 1374 (N.D. Ga. 2000); *AT&T Comm. of South Cent. States v. BellSouth Telecommunications, Inc.*, 43 F. Supp.2d 593 (M.D. La. 1999). Whether states (or state officials) may be sued in federal court under the Act is an important federal and constitutional question that this Court should settle. Given the importance of the Act and its substantial impact on the Nation's economy and given the importance of

constitutional sovereign immunity to the states, the Court should grant review.

## I. The Decision Below Is Contrary to *College Savings*, Supreme Court Precedent and the Constitution.

### A. Congress Cannot Use Its Commerce Power to Condition a State's Regulatory Responsibilities in the Act on Waiver of the State's Sovereign Immunity.

Twice the ICC and its Commissioners argued to the court of appeals that Congress may not use its *commerce power* to condition state participation in the federal scheme on a state's waiver of its constitutional sovereign immunity and twice the court recharacterized and misstated their argument. Pet. App. 33a ("The commissions in our cases argue that the Court's decision in *College Savings* has eliminated *all* so-called 'constructive' or 'implied waivers.' ") (emphasis added); *id.* at 34a; *see* ICC Petition for Rehearing in 98-2127, at 1-2. The court's holding that Congress may use its commerce power to condition Illinois' participation in the Act on waiver of its sovereign immunity conflicts with this Court's commerce clause jurisprudence and the Constitution.

It is a basic principle of federalism that the Constitution creates a federal government of enumerated powers, and that those powers are defined and limited. The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8 cl. 3; *United States v. Lopez*, 514 U.S. 549, 552-53 (1995). This Court has identified three broad categories of activity Congress may regulate under the

Commerce Clause: 1) Congress may regulate the use of the channels of interstate commerce; 2) Congress may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and 3) Congress may regulate those activities that substantially affect interstate commerce. *United States v. Morrison*, 120 S. Ct. 1740, 1749 (2000).

Congress may not, however, "regulate" state sovereign immunity under the Commerce Clause. A state's sovereign immunity is not a commercial or economic activity. The states' immunity from suit is a fundamental aspect of sovereignty, deriving from the structure of the Constitution itself. *College Savings*, 119 S. Ct. at 2230; *Alden*, 119 S. Ct. at 2246, 2254. Nor can the ICC's role in the Act--arbitrating and approving agreements--be understood as a commercial activity. *See, e.g., New Orleans Pub. Serv. v. New Orleans, Inc.*, 491 U.S. 350, 361 (1989) ("[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States."). The states' conduct in *Parden v. Terminal Railway of Alabama Docks Dep't*, 377 U.S. 184 (1964), (owning and operating a railroad) and *College Savings* (marketing and administering a tuition prepayment program) was commercial activity. *College Savings*, 119 S. Ct. at 2224, 2226. Because it was, Congress could regulate it under its commerce power. Here, however, the ICC is tasked under the Act to mediate disputes, arbitrate open issues, and approve interconnection agreements; and in fulfilling these noncommercial, regulatory obligations, waiver of immunity is simply not an issue. In fact, the prospect of Congress conditioning the

ICC's ability to do so on waiver of Illinois' sovereign immunity would exceed Congress' power under the Commerce Clause and, therefore, violate the Constitution.

Congress may, however, use its spending power to achieve an objective that it could not achieve directly under its other Article I powers. For example, in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the Court indicated that conditioning participation in a federally funded program on a state's consent to waive its immunity was a permissible use of Congress' spending power. *Id.* at 247; *College Savings*, 119 S. Ct. at 2227 n.2 ("[C]onditions attached to a State's receipt of federal funds are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful *commercial* activities.") (emphasis added). Congress, however, did not enact the Act pursuant to the Spending Clause; the Act was enacted under the Commerce Clause. Therefore, the spending power waiver analysis under *Atascadero* is inapplicable.

A purported "invitation" for states to waive their constitutional sovereign immunity as a condition for participating as a regulator in the federal scheme lies outside of Congress' power to regulate commerce under the Commerce Clause. The court of appeals failed to appreciate the constitutional limitations on Congress' commerce power and the commercial activity underlying the *Parden* and *College Savings* decisions. Although Congress may have the power under the Commerce Clause to preempt the states from regulating intrastate telecommunications (or allow the states to continue to regulate), it does not have the power *under the Commerce Clause* to demand, as a condition for

state participation in the federal scheme, a waiver of the state's immunity. *See* Pet. App. 40a. Thus if, as the court of appeals held, Congress conditioned participation under the Act on waiver of sovereign immunity, then Congress exceeded its commerce power, and section 252(e)(6) is unconstitutional.

### B. The Seventh Circuit's Constructive Waiver Holding Is Contrary to *College Savings* and Conflicts With the Sixth Circuit's Decision in *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000).

In *College Savings*, the Court expressly overruled *Parden v. Terminal Ry. Co. of Alabama Docks Dep't*, 377 U.S. 184 (1964), and repudiated the doctrine of constructive waiver under the Commerce Clause. The Court rejected the idea of implied waiver of state sovereign immunity as incompatible with its cases requiring an express waiver of immunity by the state itself. *College Savings*, 119 S. Ct. at 2228. *College Savings* confirms that a state's waiver must be a deliberate, express waiver made by the state itself and, like federal sovereign immunity waivers, cannot be implied. *Id.* at 2228-29. In this case, no party claimed nor could it, that Illinois or the ICC expressly waived the state's immunity from suit in federal court. Pet. App. 38a. Thus, after *College Savings*, this express waiver inquiry is dispositive and Illinois cannot be found to have waived its immunity from suit.

Despite the clear command of *College Savings*, the Seventh Circuit formulated a new constructive waiver rule, one that in effect revived *Parden* and implied waiver under the Commerce Clause. The court relied on two cases, *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959)

and *South Dakota v. Dole*, 483 U.S. 203 (1987), that this Court distinguished as "fundamentally different" from commerce power cases. *College Savings*, 119 S. Ct. at 2231. Most obvious, *Petty* and *Dole* involved the Compact Clause and Spending Clause, respectively, whereas, this case involves legislation under the Commerce Clause.

In *College Savings*, this Court found *Petty* distinguishable because under the Compact Clause "States *cannot* form an interstate compact without first obtaining the express consent of Congress." *College Savings*, 119 S. Ct. at 2231. In contrast, under the Act, state commissions are not required to apply to Congress for approval or otherwise obtain the "consent" (express or implied) of Congress before performing their responsibilities. The Court also found *Dole* and other spending power cases distinguishable from commerce power cases because in exercising its spending power, Congress may "condition its grant of federal funds to the states upon their taking certain action Congress could not require them to take, and their acceptance of the funds entails an agreement to the actions." *Id.* The Court considered funds disbursed under the spending power to be gifts to states. *Id.*

In this case, however, Congress enacted the Act under the Commerce Clause, not the Spending Clause, and states do not receive federal funds for performing their responsibilities under the Act. As a consequence, state commissions do not need to apply to Congress to perform their responsibilities or to agree to specific conditions, which might include a waiver of immunity, in exchange for federal funds. In fact, that the FCC must expressly preempt a state's jurisdiction under § 252(e)(5) if the state fails to timely perform its responsibilities (or perform them at all) confirms that states

have jurisdiction over such matters to begin with and, therefore, do not have to apply to Congress or agree to specific conditions to obtain such jurisdiction.

The common thread uniting *Petty* and *Dole*, as the *College Savings* Court implicitly recognized, is the contractual basis for the waiver in each case. In *Petty*, the bistate commission created pursuant to an interstate compact was found to have consented to suit in federal court by reason of a suability provision attached to the congressional approval of the contract. *College Savings*, 119 S. Ct. at 2231; *Petty*, 359 U.S. at 789. Similarly, in *Dole* and other spending power cases, when Congress legislated under the Spending Clause, it in effect offered to form a contract with potential recipients of funding: in return for federal funds, states agreed to comply with federally imposed conditions. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Here, of course, no such "contract" arises when Congress legislates under the Commerce Clause.

Besides misconceiving *College Savings*, the Seventh Circuit misunderstood the nature of the Act and its effect on the existing federal-state regulatory model. In the court's view, states play the role of a "'deputized' federal regulator," "regulating on behalf of Congress," and their sole authority with respect to agreements is "derived from provisions of the Act and not from their own sovereign immunity." Pet. App. 41a-42a. Congress has preempted state jurisdiction over local telephone service, so the theory goes, and then given portions of it back to the states with conditions attached. Thus, according to the court, regulating local telephone service "is no longer an " 'otherwise permissible activity' "

for the states. Pet. App. 44a (quoting *College Savings*, 119 S. Ct. at 2231).

The court's view is belied by the plain language, structure and purpose of the Act, ignores § 601(c) of the Act prohibiting implied preemption of state law, and is contrary to the dual federal-state regulatory model preserved by the Act. *Iowa Utilities*, 119 S. Ct. at 731 n.8. The Act does not preempt state jurisdiction over local telephone service *in toto*, but rather specifically *preserves* it, where authority is not explicitly given to the FCC. 47 U.S.C. § 152(b); *see id.* §§ 251(d)(3), 252(e)(3), 261(b), (c); *cf.* 47 U.S.C. § 276(c) (expressly preempting state regulations inconsistent with federal law), 251(e)(1) (granting exclusive authority to FCC over numbering administration). Historically, states have been the regulators of local telephone service and they continue to perform that role after the Act. 47 U.S.C. § 152(b); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). In the Act, Congress preserved state preeminence over local telephone matters, where not expressly given to the FCC. 47 U.S.C. § 152(b); *Iowa Utilities*, 119 S. Ct. at 731 n.8 (1999). Moreover, section 601(c)(1) adopts a rule of statutory construction expressly prohibiting implied preemption of state law. What's more, as mentioned above, that the FCC must expressly preempt a state's jurisdiction under section 252(e)(5) confirms that states have jurisdiction over such matters in the first place.

Furthermore, the Seventh Circuit's view of the Act and the court's "give-back theory" are inconsistent with this Court's view of the Act in general and section 152(b) (a section unchanged by the 1996 amendment) in particular. In *Iowa Utilities*, the Court observed that the Act extends federal

authority into local matters formerly within the states' exclusive control. And, although the Court views the Act as expressly preempting the states' jurisdiction over certain matters, it does not view the Act as preempting state jurisdiction wholesale and offering to return portions of it to the states. *Iowa Utilities*, 119 S. Ct. at 731 n.8; *see* Pet. App. 44a.

In the court's view, by authorizing the ICC to regulate telecommunication in Illinois—regulatory authority the ICC has exercised since at least 1913, *see City of Edwardsville v. Illinois Bell Tel. Co.*, 310 Ill. 618, 619 (1924)--and then by failing to "forbid" the ICC from exercising that authority after passage of the 1996 Act, Illinois "agreed unmistakably and affirmatively" to waive its sovereign immunity. Pet. App. 43a n.10. But this view is a reprise of *Parden* cloaked in different language. This Court has rejected *Parden* and implied waivers under the Commerce Clause. The Seventh Circuit's opinion finding that Illinois constructively waived its sovereign immunity by carrying out its responsibilities under the Act is contrary to *College Savings*.

In addition, the Seventh Circuit expressly acknowledged that its constructive waiver holding conflicted with the Sixth Circuit's opinion in *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000). Pet. App. 45a n.12. In *GTE*, the Sixth Circuit stated that "it is virtually certain that a state utility commission's decision to accept regulatory authority under the [1996 Act] cannot legitimately be construed as a valid waiver of sovereign immunity." *GTE*, 209 F.3d at 922 n.6. The Sixth Circuit believed *College Savings*' command so clear that it was unnecessary for the court to undertake an extended constructive waiver analysis. Thus, given that the

Seventh Circuit's constructive waiver holding conflicts with *College Savings* and *GTE*, the Court should grant review.

### C. The Act Does Not Inform States With the Clarity Required by This Court that Performing the Regulatory Responsibilities Given to Them Will Result in Waiver of Their Sovereign Immunity.

Even assuming for the sake of argument the validity of constructive waiver under the Commerce Clause, and further assuming Congress intended to condition participation on waiver, it did not express that intent with the clarity required by this Court. In discussing the clarity necessary for waiver of sovereign immunity, the Court in *United States v. Nordic Village*, 503 U.S. 30 (1992) stated that Congress has not expressed its intent for waiver in unmistakably clear language where "plausible" alternative readings of a statute are possible. *Id.* at 34-35, 37; *Lane v. Pena*, 518 U.S. 187, 199-200 (1996); *see College Savings*, 119 S. Ct. at 2229 (harmonizing the rules for federal sovereign immunity with state sovereign immunity).

Congress created a mechanism for review in section 252(e)(6) that excludes states as parties and that provides for review of the agreements themselves. Judge Crabb in the Wisconsin companion cases proposed the same reading of section 252. *Wisconsin Bell v. Public Service Comm'n of Wisconsin*, 57 F.Supp2d 710, 717-18 (W.D. Wis. 1999), *rev'd sub nom. MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000). In response, the Seventh Circuit merely determined that it "cannot accept" the ICC's reading of the statute. Pet. App. 28a. What the court failed to do, however, as required by *Nordic Village*, is

explain why the ICC's reading of the Act was implausible. In fact, the ICC not only offered a plausible reading, but the sole reading of the statute that hews to Congress' intent and the plain language of the statute, observes principles of federalism, respects states' sovereignty, and is constitutional.

In any case, under the waiver analysis whether the court's reading of the statute is better than the ICC's is not relevant. What is relevant is whether the Act is susceptible to alternative readings. If the Act is, the requisite clarity is missing and there can be no waiver of immunity under *Nordic Village*. Given the ICC's and Judge Crabb's plain reading of the statute and this Court's description of the Act as "in many important respects a model of ambiguity or indeed even self-contradiction," the court of appeals erred in concluding that the Act is not susceptible to alternative readings. *Iowa Utilities*, 119 S. Ct. at 738.

## II. The Decision Below Conflicts With *Ex Parte Young*, 209 U.S. 123 (1908).

### A. The Lower Court Erred in Determining Congress Intended for *Ex parte Young* Actions to Be Brought Under the Act Against Individual State Commissioners.

The Act does not authorize actions against individual state officials. Under the Court's decision in *Seminole Tribe*, the inquiry is whether Congress intended to authorize *Ex parte Young* actions. *Seminole Tribe*, 517 U.S. at 75 n.17. If Congress did not intend to authorize suits against state officials as individuals, then the *Ex parte Young* exception is unavailable. The Act refers only to state commissions, not

commissioners of state commissions. More particularly, section 252(e)(6), the articulated basis for federal jurisdiction, refers only to state commissions. In this case, the court of appeals impermissibly assumed Congress authorized an *Ex parte Young* action because Congress did not expressly preclude it. *See* Pet. App. 51a (noting that "the IDEA did not contain an explicit remedial scheme that would prevent an *Ex parte Young* suit.") (internal quotations omitted). The purpose and structure of the Act, and the plain language in section 252(e)(6), make clear that Congress did not intend for review of state commission determinations made under section 252 to be accomplished through *Ex parte Young* actions against the commissioners themselves. It would be anomalous if Congress had intended to expose state commissioners "to the full panoply of a federal court's remedial powers, including, presumably, contempt sanctions," when the same actions, if performed by the FCC under section 252(e)(5) in lieu of state commissions, would be subject only to administrative review under 47 U.S.C. § 402. *Seminole Tribe*, 514 U.S. at 75.

The court of appeals also failed to reconcile its reading of the Act to require review of administrative agency actions—whether state commission or FCC—with a suit against the individual commissioners under an *Ex parte Young* theory. *See* Pet. App. 37a. The court construed section 252(e)(6) to require that state commissions be made parties to suits reviewing their actions "just as the FCC is a party to suits seeking review of its actions." *Id.* at 28a. Thus, in the court's view, section 252(e)(6) provides for judicial review of regulatory actions made by an administrative agency, whether federal or state. Under federal law, the FCC is

named as a party to appeals from its orders. *Ingalls Shipbuilding v. Director, OWCP*, 117 S. Ct. 796, 806-07 (1997); *see* Fed. R. App. P. 15(a) (requiring that agency be named respondent in review of its orders). Under the Act, if the FCC preempts a state commission's jurisdiction under section 252(e)(5), assumes responsibility for a proceeding, and acts for the state commission, the FCC's actions are subject to judicial review. There is no indication in section 252(e)(6) that an aggrieved party may sue the FCC commissioners individually or that it may seek declaratory, injunctive, or relief other than administrative review of the FCC's actions. Similarly, under Illinois law the ICC is named as a party to appeal of its orders, 220 ILCS 5/10-201; 155 Ill.2d R.335(a), and there is no indication in section 252(e)(6) that an aggrieved party may sue a commissioner of a state commission or that it may seek declaratory, injunctive, or relief other than administrative review of a state commission's determinations made under section 252. The court's reading of the review provided in the Act is simply incompatible with an action based on an *Ex parte Young* theory.

Furthermore, in simply comparing the types of remedies courts may prescribe rather than in considering to whom Congress intended the remedies to apply, the court failed to appreciate the larger principle reconfirmed in *Seminole Tribe*, that where Congress creates a remedial scheme for the enforcement of a particular federal right, the courts should not supplement that remedial scheme with additional remedies. Section 252 establishes a limited remedial scheme for review of state commission determinations made in approving or rejecting agreements that does not include suits

against individual state commissioners to otherwise accomplish review of those state commission determinations. The court of appeals rewrote the statutory scheme, rendered superfluous the limited statutory remedy provided under section 252(e)(6) and permitted the carriers to obtain relief against the individual commissioners that the carriers could not otherwise obtain under section 252(e)(6). As a consequence, the court's opinion allowing *Ex parte Young* actions under the Act was improper and contrary to this Court's precedent.

### B. The Court of Appeals Erred in Finding the *Ex Parte Young* Exception Applicable Because the Exception Applies Only to Ongoing Constitutional Violations by State Officials.

The basis of the *Ex parte Young* doctrine is that when a state officer acts in violation of the Constitution, he cannot claim to be acting on behalf of the state for purposes of the Eleventh Amendment and, therefore, an action against him is not a suit against a state barred by the Eleventh Amendment. *Ex parte Young*, 209 U.S. 123, 159-60 (1908); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 88, 102 (1984) ("*Pennhurst II*"). To the ICC's knowledge, in the time since *Ex parte Young* was decided, this Court has not expanded the narrow *Ex parte Young* exception beyond alleged constitutional violations. This is not surprising since the Court has repeatedly instructed that the *Ex parte Young* exception is a narrow exception, not to be given an expansive interpretation. *E.g.*, *Pennhurst II*, 465 U.S. at 102.

The ICC argued below that the *Ex Parte Young* exception is inapplicable to the carriers' claims under the Act because

the carriers failed to allege that the individual commissioners violated the Constitution, whether by virtue of the Supremacy Clause[3] or more familiar constitutional provisions. The court of appeals, however, mistakenly believed that allegations of federal statutory violations alone are sufficient to invoke the *Ex parte Young* exception and lift a state's sovereign immunity. Pet. App. 46a; *see id.* at 95a-96a. The court further erred in finding the exception applicable to instances where, as here, state officials are authorized by federal law to interpret and apply federal law in arbitrating and approving agreements under the Act. Under the court's view of the *Ex parte Young* doctrine, each commissioner would be "stripped of his official or representative character and [would be] subjected in his person to the consequences of his individual conduct" for interpreting and applying federal law but reaching a result determined later to be incorrect. *Ex parte Young*, 209 U.S. at 159-60. The court's decision is contrary to long-standing precedent of this Court limiting application of the *Ex parte Young* exception to alleged constitutional violations and, if there were any doubt, the Court's recent sovereign immunity cases resolve it.

This Court's sovereign immunity decisions last Term confirm that the *Ex parte Young* exception applies only to ongoing constitutional violations by state officials. In *College Savings* and *Alden*, the Court reaffirmed that state

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3 Importantly, the Supremacy Clause is not a source of federal rights; rather it secures federal rights by according them priority when they come into conflict with state law. *Golden State Transit v. Los Angeles*, 493 U.S. 103, 107 (1989).

sovereign immunity is *constitutional*, deriving from the structure of the Constitution itself. *College Savings*, 119 S. Ct. 2230; *Alden*, 119 S. Ct. at 2254. The Court also reaffirmed that the principle of state immunity embodied in the Eleventh Amendment is a constitutional limitation on the federal judicial power established in Article III of the Constitution. *Alden*, 119 S. Ct. at 2266. The *Ex parte Young* doctrine, however, is a judicially-created narrow exception to the Eleventh Amendment. It represents an attempt by the Supreme Court to "harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Pennhurst II*, 465 U.S. at 105.

As *Alden* confirms, the *Ex parte Young* exception to the Eleventh Amendment is necessary to ensure the *Constitution* "remains the supreme law of the land." *Alden*, 119 S. Ct. at 2263. Thus, although state sovereign immunity is constitutional, the Court has determined that such immunity must yield in certain cases to protect other rights and privileges secured by the Constitution. Consequently, *Ex parte Young* requires a constitutional predicate for its application. In fact, given the constitutional origins of sovereign immunity and its limits on congressional power under Article I and federal judicial power under Article III, there would appear to be little difference between Congress using its Article I powers to abrogate a state's Eleventh Amendment immunity (an action found to be without constitutional authority in *Seminole Tribe*) and a federal court using *Ex parte Young* to accomplish the same result by allowing private suits alleging nonconstitutional, federal

statutory violations by state officials. In each case, the *constitutional* justification for such action is lacking.

Here, Congress had no constitutional authority to subject Illinois to private suits in federal court under the Act, an exercise of Congress' commerce power. The ICC's arbitration of disputed issues between MCI and Ameritech Illinois and approval of their interconnection agreement did not challenge the supremacy of the Constitution or violate any right protected by the Constitution.[4] *See Alden*, 119 S. Ct. at 2263. Unlike a typical *Ex parte Young* action brought to enjoin a state official's enforcement of a state law alleged to conflict with federal law, in this case MCI and Ameritech Illinois claimed the ICC erred in resolving the disputed issues and approving their interconnection agreement—actions federal law specifically authorizes the ICC to take. *See Papasan v. Allain*, 478 U.S. 266, 277 (1986) ("In accordance with its original rationale, *Young* applies only where the underlying authorization upon which the named official acts is asserted to be illegal.").

In substance, the carriers simply complained that in applying federal law to the evidence before it, the ICC "got it wrong." However, an incorrect decision by state officers acting in their official capacities and empowered to do so is

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4 The discussion in this section does not apply to Count V of MCI's complaint, which alleged a constitutional violation under the Due Process Clause of the Fourteenth Amendment. Because the allegations in Count V were based on past conduct by the Commissioner, however, that count failed to come within the *Ex parte Young* exception for the reasons discussed in section II.C.

insufficient to override a state's sovereign immunity. As the Court stated in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949):

> It is argued that an officer given the power to make decisions is only given the power to make correct decisions. If his decisions are not correct, then his action based on those decisions is beyond his authority and not the action of the sovereign. There is no warrant for such a contention in cases in which the decision made by the officer does not relate to the terms of his statutory authority. Certainly the jurisdiction of a court to decide a case does not disappear if its decision on the merits is wrong. And we have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so. We therefore reject the contention here.

*Id.* at 695 (citation omitted); *see Pennhurst II*, 465 U.S. at 113 n.22 ("*Larson* thus made clear that, at least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief is effectively against it."). Accordingly, the court erred in finding that the individual commissioners could be sued in an *Ex parte Young* action when the carriers failed to allege any violation of the Constitution.

### C. The Court of Appeals Erred in Finding that the ICC's Arbitration Decision Incorporated into the Carriers' Agreement Is an Ongoing Violation.

The court of appeals found that the carriers' claims alleged ongoing violations and requested prospective relief and, therefore, came within the *Ex parte Young* exception. Pet. App. 46a-47a. Specifically, in the court's view, since the ICC's arbitration determinations "are still in place" and the carriers were seeking an injunction to "conform the [individual commissioners'] future actions, including their continuing enforcement of the challenged determinations, with federal law," the carriers met the requirements for application of the exception. *Id.* at 47a. In other words, in the court's view, the agreement itself created the ongoing violation.

The court's analysis and holding was contrary to the decisions of the Court. In *Edelman v. Jordan,* 415 U.S. 651 (1974), the Court expressly confined the *Ex parte Young* exception to suits requesting prospective injunctive relief to prevent future violations of federal law. *Id.* at 655. "Consequently, *Young* has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past..." *Papasan*, 478 U.S. at 277-78. The focus of the *Ex parte Young* inquiry is on the *actions of the state officials*, and the relevant inquiry is whether prospective relief could prevent an ongoing violation of federal law by *state officials*. *Pennhurst II*, 465 U.S. at 102-03; *Lett v. Magnant*, 965 F.2d 251, 255 (7th Cir. 1992). No party in this case claimed that the commissioners themselves were violating federal law when

the claims were filed, let alone that they were continuing to violate federal law afterwards. The arbitration is over with respect to the issues complained of and will not recur.

The carriers sought a declaration that the ICC violated the law in the past, relief not within the narrow *Ex parte Young* exception. That the ICC's arbitration determinations are still in place does not transform that past decision into a present, ongoing violation by the Commissioners. Nor does the request to conform the Commissioners' future actions—actions that are necessarily hypothetical and speculative, not threatened or imminent--with federal law constitute an ongoing violation, much less satisfy the requirements for an injunction. The carriers did not allege that the Commissioners enforced or threatened to enforce the specific terms of the interconnection agreement that are alleged to violate federal law. The arbitration that helped finalize MCI's and Ameritech Illinois' interconnection agreement is completed with respect to the issues complained of and will not recur, so there is no future conduct by the ICC for a court to remedy. At bottom, the carriers sought relief from a past ICC arbitration decision that they incorporated into their agreement, but the agreement itself does not constitute the ongoing violation for purposes of *Ex parte Young*. *See Republic of Paraguay v. Allen*, 134 F.3d 622, 628 (4th Cir.), *aff'd sub nom. Breard v. Greene*, 118 S. Ct. 1352 (1998).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 6, 2000

**APPENDIX A – OPINION IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED JULY 24, 2000**

UNITES STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 98-2127

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MCI TELECOMMUNICATIONS CORPORATION and MCI METROACCESS TRANSMISSION SERVICES, INCORPORATED,

*Plaintiffs-Appellees*,

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION.

*Intervenors -Appellees*,

v.

ILLINOIS BELL TELEPHONE COMPANY, doing business as Ameritech Illinois, Incorporated,

*Defendant-Appellee*,

ILLINOIS COMMERCE COMMISSION, TERRY HARVILL, RUTH K. KRETSCHMER, in their official capacities as Commissioners of the Illinois Commerce Commission and not as individuals, *et al.*,

*Defendants-Appellants*.

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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 2225 – **David H. Coar**, *Judge*

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Argued November 6, 1998 – Reargued December 2, 1999
Decided July 24, 2000

No. 99-2805

WISCONSIN BELL, INCORPORATED, doing business as Ameritech Wisconsin,

*Plaintiff-Appellant,*

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, CHERYL L. PARRINO, in her official capacity as a member of the Commission, DANIEL J. EASTMAN, in his official capacity a member of the Commission, et al.,

*Defendants-Appellees.*

No. 99-2806

WISCONSIN BELL, INCORPORATED, doing business as AMERITECH WISCONSIN,

*Plaintiff-Appellant,*

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, CHERYL L. PARRINO, and JOSEPH P. METTNER, Commissioners of the Public Service Commission of Wisconsin,

*Defendants-Appellees.*

No. 99-2811

WISCONSIN BELL, INCORPORATED, doing business as AMERITECH WISCONSIN,

*Plaintiff-Appellant,*

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, CHERYL L. PARRINO, DANIEL J. EASTMAN, et al.,

*Defendants-Appellees.*

No. 99-2873

MCI METRO ACCESS TRANSMISSION SERVICES, INCORPORATED, and MCI TELECOMMUNICATIONS CORPORATION,

*Plaintiffs-Appellants,*

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, CHERYL L. PARRINO, DANIEL J. EASTMAN, in their official capacities as members of the Commission, et al.,

*Defendants-Appellees.*

No. 99-2992

WISCONSIN BELL, INCORPORATED, doing business as AMERITECH WISCONSIN,

*Plaintiff,*

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,
CHERYL L. PARRINO, DANIEL J. EASTMAN, et al.,

*Defendants-Appellees,*

UNITED STATES OF AMERICA,

*Intervenor-Appellant.*

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Appeals from the United States District Court
for the Western District of Wisconsin.
Nos. 97 C 566; 98 C 11; 98 C 153;
98 C 366—**Barbara B Crabb**, *Judge*

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December 2, 1999, Argued
July 24, 2000, Decided

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Before RIPPLE, KANNE and DIANE P. WOOD, *Circuit Judges*.

RIPPLE, *Circuit Judge*.

These consolidated appeals challenge determinations made by state regulatory commissions exercising their authority under the Telecommunications Act of 1996 ("the 1996 Telecommunications Act" or "the Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of Title 47 of the United States Code). We must decide whether private carriers may sue state commissions and their commissioners in federal court for alleged violations of §§ 251 and 252 of the Act. These sections set forth the proc-

ess by which Congress sought to bring competition to local telephone exchange markets through interconnection agreements between incumbent and new carriers. *See* 47 U.S.C. §§ 251 & 252 (Supp. II 1996).

One of the consolidated cases, 98-2127, is before us on rehearing. In this case, Illinois Bell, Inc. (doing business as Ameritech Illinois) ("Ameritech Illinois") and MCI Telecommunications and MCI Metro Access Transmission Services, Inc. (collectively "MCI") claim that the Illinois Commerce Commission ("the ICC") and various individual Commissioners ("the ICC Commissioners") violated the Act with respect to the ICC's arbitration and approval of the carriers' interconnection agreement. The ICC and the ICC Commissioners filed motions to dismiss on Eleventh Amendment immunity grounds. The district court denied those motions, *see MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 1998 U.S. Dist. LEXIS 4470, No. 97 C 2225, 1998 WL 156678 (N.D. Ill. 1998), and the ICC and the ICC Commissioners have appealed.

We affirmed the district court's judgment in a previous opinion. *See MCI Telecomms. Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315, *amended by* 183 F.3d 558 (7th Cir. 1999). Thereafter, however, the Supreme Court issued a trio of opinions addressing the scope of Eleventh Amendment immunity. *See Alden v. Maine*, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 144 L. Ed. 2d 605, 119 S. Ct. 2219 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999). We therefore granted rehearing, restored 98-2127 to

our calendar for oral argument, and requested that the parties file supplemental briefs addressing the impact of the Supreme Court's decisions on this case. See 183 F.3d at 567 (7th Cir. 1999).

The other cases, all from Wisconsin, are before us for the first time. Although aligned in various ways, the parties involved in the disputes include Wisconsin Bell, Inc. (doing business as Ameritech Wisconsin) ("Ameritech Wisconsin"), MCI,[1] the Public Service Commission of Wisconsin ("the PSCW") and various members of that commission ("the PSCW Commissioners"). In each case, the PSCW or the PSCW Commissioners or both were named as defendants, and they filed motions to dismiss the lawsuits against them on Eleventh Amendment grounds. The district court granted the motions, *see Wisconsin Bell, Inc. v. Public Serv. Comm'n,* 57 F. Supp. 2d 710 (W.D. Wis. 1999), and the carriers now appeal the district court's judgment.

For the reasons that follow, we hold that the Eleventh Amendment does not bar these suits against the state commissions and their commissioners because, in the particular circumstances present in these cases, the states have waived their Eleventh Amendment immunity by participating in the regulatory scheme created by the Act. We also hold, as an independent basis for decision, that the carriers may proceed with their respective federal claims for equitable relief against the individual commissioners under the *Ex parte Young* doctrine.

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1 Again, both MCI Telecommunications Corp. and MCI Metro Access Transmission Services, Inc.

## I. BACKGROUND

### A. The Statutory Scheme

Congress enacted the 1996 Telecommunications Act "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996). The Act "fundamentally restructures local telephone markets" by transforming the "long-standing regime of state-sanctioned monopolies" into a competitive market. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999). Congress recognized that, even after the removal of regulatory restrictions on competition, significant economic barriers would remain to block entry into local telephone markets. Prospective market entrants would face the cost of duplicating an incumbent provider's local network infrastructure. To remove this economic barrier, the Act essentially requires incumbent local exchange carriers ("LECs") to share their networks with competitors. Section 251 of the Act requires incumbent LECs to allow new entrants to interconnect with existing local networks, to lease elements of existing local networks at reasonable rates, and to purchase the incumbents' services at wholesale rates and resell those services to retail customers. *See* 47 U.S.C. § 251 (Supp. II 1996).

Section 252 sets out the process by which incumbent LECs and prospective carriers establish interconnection agreements. First, incumbent LECs and prospective carriers must negotiate in good faith to reach voluntary interconnection agreements. At any time during the negotiations, a party

may ask the appropriate state commission to participate as a mediator in the negotiations. See *id.* § 252(a)(2). If negotiations prove unsuccessful, subsection 252(b) provides for compulsory arbitration of any open issues. During the period from the 135th to the 160th day after an incumbent LEC receives a request for negotiation, any party to the negotiation may petition the state commission to arbitrate any open issues. *See id.* § 252(b)(1). Sections 251 and 252 establish certain standards that the state commission must follow in resolving open issues by arbitration and in imposing conditions on the parties. The state commission is also bound by Federal Communications Commission ("FCC") regulations issued pursuant to § 251.

Subsection 252(e) requires any interconnection agreement reached by negotiation or arbitration to be submitted to the state commission for approval and specifies the grounds on which a state commission can reject an agreement. Specifically, state commissions may reject negotiated interconnection agreements only if the commission finds (1) that the agreement discriminates against a carrier that is not a party to the agreement or (2) that implementation of the agreement (or a part thereof) would be inconsistent with "the public interest, convenience, and necessity." *Id.* § 252(e)(2)(A). A state commission may reject an arbitrated interconnection agreement only if the agreement (or part thereof) (1) does not meet the requirements of § 251 and its implementing regulations or (2) fails to meet the pricing standards set forth in subsection 252(d). *See id.* § 252(e)(2)(B).

Subsection 252(e)(5) further provides that, if a state commission fails to carry out any of its responsibilities under § 252, then the FCC must assume responsibility for the pro-

ceeding and act for the state commission in carrying out its functions. An implementing regulation to § 252 provides that a state commission "fails to act" for purposes of subsection 252(e)(5)--thus prompting the FCC to step in and assume the state commission's responsibilities--if it fails to respond within a reasonable time to a request for mediation or a request for arbitration, or if it fails to complete an arbitration within the established time limits. *See* 47 C.F.R. § 51.801(b). A state commission will not be deemed to have failed to act, however, if it merely fails to approve or reject an agreement within the established time limits. *See id.* § 51.801(c). In such a case, the agreement will be deemed approved. *See* 47 U.S.C. § 252(e)(4) (Supp. II 1996).

Therefore, subsections 252(e)(1), (e)(4), and (e)(5), taken together and read in conjunction with the FCC regulations, create a scheme that provides regulatory oversight of interconnection agreements, either by a state commission or by the FCC in the state commission's place. Only one scenario, not present in our cases, appears to be a variation to this scheme: when the parties reach a voluntarily negotiated agreement without any request for mediation or arbitration and the state commission fails to act to approve or reject the agreement. When these two circumstances occur, the resulting agreement will be deemed approved by the state commission, *see id.* § 252(e)(4); the FCC will not step in to assume the approval function.

The Act provides that federal district courts have exclusive jurisdiction to review FCC or state commission actions relating to interconnection agreements. In subsection 252(e)(4), Congress expressly eliminated state court jurisdiction to review actions of state commissions in approving or

rejecting agreements under § 252. Moreover, subsection 252(e)(6), titled "Review of State commission actions," provides that, whenever a state commission fails to act, the exclusive remedies for that failure to act will be proceedings by the FCC and any judicial review of the FCC's actions. Subsection 252(e)(6) also provides that, "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 [and section 252]."

On a separate but related note, Congress also has opened up long distance service competition. The Act allows Bell operating companies[2] ("BOCs"), such as Ameritech Illinois or Ameritech Wisconsin in our cases, to provide long distance service to their customers--a service generally off limits to BOCs under the pre-1996 Telecommunications Act regime--once certain conditions have been met. Section 271 of the Act allows BOCs to provide "out-of-region" long distance service. *See id.* § 271(b)(2). For a BOC to provide "in-region" long distance service, however, the BOC must obtain FCC approval. *See id.* § 271(b)(1). To obtain FCC approval, the BOC must satisfy numerous requirements, one of which is to show that the BOC has opened up its local network to interconnection with new competitors. *See id.* § 271(c). A

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2 A "Bell operating company" is one of the local "Baby Bells" split off from AT&T in the divestiture decree. See Peter W. Huber *et al.*, Federal Telecommunications Law 1362 (2d ed. 1999); see also 47 U.S.C. § 153(4) (Supp. II 1996) (listing the individual Bell operating companies).

BOC may make this showing either by entering into interconnection agreements with "one or more unaffiliated competing providers of telephone exchange service," *id.* § 271(c)(1)(A), or, if no new entrants have requested interconnection with the BOC, by showing that the appropriate state commission has approved "a statement of the terms and conditions that the [BOC] generally offers to provide such access and interconnection," *id.* § 271(c)(1)(B). These two "methods" of obtaining FCC approval are commonly known as "Track A" and "Track B." *See generally SBC Communications Inc. v. F.C.C.*, 138 F.3d 410, 413-21 (D.C. Cir. 1998) (discussing the tracks by which BOCs may obtain FCC approval under § 271 to provide in-region long distance services).

For a BOC seeking to obtain FCC approval using the Track B approach, subsection 271(c)(1)(B) requires the BOC to file with the appropriate state commission a statement of generally available terms and conditions (a "SGAT") and to obtain approval of the SGAT as provided by subsection 252(f). The SGAT sets forth the terms and conditions the company intends to offer new entrants seeking interconnection and access to the BOC's network. Once a BOC has filed a SGAT with a state commission, that commission has 60 days within which to complete a review of it, *see* 47 U.S.C. § 252(f)(3)(A) (Supp. II 1996), or to permit the statement to take effect, *see id.* § 252(f)(3)(B). According to subsection 252(f)(2), a state commission may not approve an SGAT unless the SGAT complies with subsection 252(d) and § 251 and the FCC regulations thereunder. The Act also allows state commissions to establish and enforce state law requirements in their review of an SGAT, but the commissions

may do so only if those standards do not conflict with the Act. *See id.* § 252(f)(2). Even after an SGAT has been allowed to take effect under subsection 252(f)(3)(B), however, the state commission may continue to review such an SGAT and may approve or disapprove it under subsection 252(f)(2) at any time. *See id.* § 252(f)(4). As with the interconnection process, if a state commission fails to act and the FCC has been made aware of that failure to act, the FCC must assume responsibility for the SGAT and act in place of the state commission within 90 days. *See id.* § 252(e)(5). Similarly, the judicial review provision in subsection 252(e)(6) also applies to state commission determinations regarding SGATs.

**B. The Illinois Litigation**

**1. The Lawsuit**

Appeal 98-2127 began as a lawsuit over an interconnection agreement between Ameritech Illinois and MCI. After negotiations failed to produce an interconnection agreement between the two companies, MCI petitioned the ICC, in accordance with subsection 252(b)(1) of the Act to arbitrate the unresolved issues. The ICC held arbitration hearings and eventually approved a final interconnection agreement for the two companies. MCI then filed suit against Ameritech Illinois, the ICC, and various individual ICC Commissioners in their official capacities. MCI alleged that the ICC had violated certain sections of the Act when conducting the arbitration proceedings and approving the terms of the interconnection agreement. Ameritech Illinois filed a cross-claim against MCI, the ICC, and the ICC Commissioners in their official capacities, asserting that one aspect of the ap-

proved interconnection agreement was contrary to the Act. In their complaints, both MCI and Ameritech Illinois sought declaratory and other equitable relief.[3]

**2. The Motions to Dismiss**

The ICC and the ICC Commissioners moved to dismiss the claims against them on Eleventh Amendment sovereign immunity grounds. The ICC and the ICC Commissioners argued to the district court that the Act could not abrogate Illinois' immunity. They pointed out that Illinois had not explicitly authorized waiver of its immunity through any statute or constitutional provision. They further contended that their participation in the arbitration and review process under the Act did not constitute waiver of sovereign immunity because no provision of the Act required the state to submit to suit as a condition for exercising the authority granted it.

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3 Ameritech Illinois also filed a separate action against the ICC Commissioners, challenging their approval of two negotiated interconnection agreements between Ameritech Illinois and other telecommunications carriers. An appeal in that case, 98-2256, originally was part of this appeal. The agreements at issue in 98-2256 were made through private negotiations without mediation or arbitration by the ICC. During the pendency of the appeal in 98-2256, however, Ameritech Illinois filed a motion requesting that we remand 98-2256 to the district court so that it may be dismissed voluntarily with prejudice. We have granted that motion and therefore need not address the applicability of the Eleventh Amendment to litigation involving such privately negotiated agreements. We also have remanded to the district court a different case, 98-2566, which was originally part of this consolidated appeal, so that it too may be dismissed voluntarily.

Ameritech Illinois and MCI replied that Congress had conditioned state commissions' participation in the arbitration and approval process on their submission to federal court jurisdiction. Thus, they argued, the ICC and the ICC Commissioners waived any Eleventh Amendment immunity when they elected to implement the federal regulatory scheme set forth in the Act with full knowledge that their determinations would be reviewable exclusively in federal court.

In reply, the ICC and the ICC Commissioners reemphasized that the Act contains no specific language expressly conditioning state commission participation in the regulatory process on consent to suit in federal court. Rather, they contended, the Act provides only for federal court review of the agreements themselves.

**3. Decision of the District Court**

The district court denied the motions to dismiss. The district court determined that the ICC defendants constructively had waived their Eleventh Amendment immunity and, in the alternative, that there was no Eleventh Amendment barrier to the suits against the ICC Commissioners because of the *Ex parte Young* doctrine. The district court's decision in this case preceded the Supreme Court's decisions in *Alden, College Savings* and *Florida Prepaid,* and, therefore, the district court could not have accounted for any impact those decisions might have on the Eleventh Amendment analysis.

**(a)**

The district court first determined that *Seminole Tribe v. Florida,* 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996), had not invalidated the doctrine of implied waiver. In

the court's view, although *Seminole Tribe* restricted Congress' ability to abrogate directly the states' sovereign immunity, the Supreme Court's decision left untouched the "unremarkable and completely unrelated" doctrine of waiver. *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 1998 U.S. Dist. LEXIS 4470, *19, No. 97 C 2225, 1998 WL 156678, at *6 (N.D. Ill. 1998) (quoting *Seminole Tribe,* 517 U.S. at 63) (internal quotation marks omitted). The district court then concluded that the ICC had participated voluntarily in the regulatory scheme established by the 1996 Telecommunications Act because the Act provided states with the option to arbitrate and to approve the interconnection agreements themselves or, instead, to let the FCC perform that function. Additionally, the district court noted, Congress had made it expressly clear in subsection 252(e)(6) that, if a state opted to participate in the regulatory scheme, its actions would be reviewable in federal court. Thus, the court concluded, the ICC had waived immunity from suit in federal court by participating voluntarily in the arbitration and approval process.

**(b)**

In the alternative, the district court also held that the doctrine of *Ex parte Young* provided a basis for the ICC Commissioners' lack of Eleventh Amendment immunity from this suit. The district court first noted that, contrary to the ICC Commissioners' arguments, the relief sought by Ameritech Illinois and MCI was prospective in nature. The companies sought no money damages but only declaratory and injunctive relief to redress ongoing violations of federal law.

The district court also rejected the ICC Commissioners' argument that an *Ex parte Young* action is available only

when plaintiffs allege a constitutional (as opposed to statutory) violation. Relying on our decision in *Marie O. v. Edgar,* 131 F.3d 610 (7th Cir. 1997), the court held that an *Ex parte Young* action can be brought to vindicate violations of a federal statute.

The district court then concluded that the limitations placed on the *Ex parte Young* doctrine by *Seminole Tribe* and *Idaho v. Coeur d' Alene Tribe,* 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997), did not affect the application of the *Ex parte Young* doctrine to this case. *Seminole Tribe* limited, the district court acknowledged, the reach of *Ex parte Young* in cases in which Congress has created a detailed and comprehensive remedial scheme. But, the district court held, the provisions of the 1996 Telecommunications Act at issue in this case did not create any such detailed scheme that would limit the type of remedies available to a district court. The district court further held that the narrow exception to *Ex parte Young* created in *Coeur d'Alene* also did not apply to this case. The district court explained that "the issues of sovereign immunity presented by review of state actions taken pursuant to the Telecommunication Act are not nearly as compelling as those presented by the state of Idaho in the dispute over lands that it has historically considered a part of its territory." 1998 U.S. Dist. LEXIS 4470, *40, 1998 WL 156678, at *12.

Finally, the district court rejected the ICC Commissioners' argument that Congress did not intend to make states parties to the federal suits reviewing interconnection agreements, but instead meant only to provide review of the agreements themselves. In rejecting this argument, the district court pointed out that the subsection providing for federal court

review was titled "Review of State Commissions *Actions.*" *Id.* at *14.

**C. The Wisconsin Litigation**

**1. The Lawsuits**

**(a)**

Appeals 99-2805, 99-2873 and 99-2992 are the result of a dispute over an interconnection agreement entered into by Ameritech Wisconsin and MCI and approved by the PSCW. Ameritech Wisconsin and MCI had entered into interconnection negotiations as provided under subsection 252(a) of the Act, but because the parties failed to reach an agreement on some issues, MCI petitioned the PSCW under subsection 252(b)(1) to arbitrate the remaining issues. The PSCW held arbitration hearings and ultimately approved a final interconnection agreement between Ameritech Wisconsin and MCI.

The final agreement satisfied neither party. Thus, Ameritech Wisconsin filed suit against MCI, the PSCW, and the PSCW Commissioners in their official capacities to challenge portions of the final agreement approved by the PSCW. In its complaint, Ameritech Wisconsin alleged that certain provisions of the final agreement were contrary to the 1996 Telecommunications Act. The complaint sought declaratory and injunctive relief to enjoin the enforcement of the challenged provisions. Thereafter, MCI filed its own suit against Ameritech Wisconsin, the PSCW, and the PSCW Commissioners in their official capacities to challenge other portions of the same agreement. Like Ameritech Wisconsin, MCI alleged in its complaint that various provisions of the final agreement violated the 1996 Telecommunications Act.

MCI also sought declaratory and injunctive relief. The district court consolidated the two cases, and the United States later intervened. After the district court issued its decision in this case, each party filed its own notice of appeal.

**(b)**

Appeal 99-2806 involves the PSCW's interpretation and enforcement of previously approved interconnection agreements between Ameritech Wisconsin and TCG of Milwaukee, Inc. ("TCG") and between Ameritech Wisconsin and Time Warner Communications of Milwaukee L.P. ("Time Warner"). Ameritech Wisconsin and TCG entered into their agreement, which was approved by the PSCW, following negotiations and arbitration; Ameritech Wisconsin and Time Warner arrived at their final agreement, which the PSCW also approved, after negotiations only.

Ameritech Wisconsin's interconnection agreements with TCG and Time Warner require "reciprocal compensation" only for "local traffic" calls (calls "beginning" and "terminating" within the "local calling area"). After the PSCW had approved these agreements, a dispute arose over whether Ameritech Wisconsin was required, under its respective interconnection agreements with TCG and Time Warner, to pay reciprocal compensation for calls placed by Ameritech Wisconsin customers to the Internet via Internet service providers who were, in turn, customers of TCG or Time Warner. Because Ameritech Wisconsin believed that the disputed Internet calls did not "terminate" within the local calling area, it deemed these calls not to be "local traffic" and therefore refused to pay reciprocal compensation for them.

TCG and Time Warner, however, understood their respective interconnection agreements to entitle them to reciprocal compensation for the disputed Internet calls. Thus, they filed separate complaints with the PSCW. The companies alleged that Ameritech Wisconsin was not complying with the reciprocal compensation provisions of their respective interconnection agreements, and they asked the PSCW to enforce those provisions. The PSCW adopted the interpretation proffered by TCG and Time Warner and later entered separate enforcement orders against Ameritech Wisconsin ordering it to pay the requested reciprocal compensation. Ameritech Wisconsin then filed suit in the district court and named as defendants TCG, Time Warner, the PSCW, and the PSCW Commissioners in their official capacities. In its complaint, Ameritech Wisconsin alleged that the PSCW's enforcement orders were contrary to the 1996 Telecommunications Act, FCC regulations, and Wisconsin law. The complaint sought declaratory and other equitable relief.

(c)

The final appeal, 99-2811, stems from the PSCW's rejection of an SGAT filed with the PSCW by Ameritech Wisconsin. In proceedings before the PSCW, a number of new entrants opposed portions of the SGAT filed by Ameritech Wisconsin. The PSCW adopted the views of those that opposed Ameritech Wisconsin's SGAT, and the PSCW eventually rejected the SGAT. Ameritech Wisconsin filed suit in the district court against the PSCW and the PSCW Commissioners in their official capacities to obtain judicial review of that decision. Ameritech Wisconsin's complaint alleged violations of the 1996 Telecommunications Act, and, to the extent that the PSCW had purported to rely on state law to make its

decision, the complaint further alleged that the Act pre-empted the state laws. Ameritech Wisconsin sought declaratory and other equitable relief.[4]

**2. The Motions to Dismiss**

Like their Illinois counterparts, the PSCW and the PSCW Commissioners filed motions to dismiss each of these cases. They argued that the Eleventh Amendment provided them with immunity from suit in federal court.

Ameritech Wisconsin and MCI argued that Wisconsin had waived its immunity by choosing to regulate interconnection agreements in accordance with the 1996 Telecommunications Act. By exercising the power granted by the Act, according to Ameritech Wisconsin and MCI, the PSCW and the PSCW Commissioners had consented implicitly to being sued in federal court under subsection 252(e)(6). Alternatively, Ameritech Wisconsin and MCI argued that the PSCW Commissioners could be sued under the Ex parte Young doctrine.

**3. Decision of the District Court**

The district court issued two decisions relevant to our discussion. In both opinions, the district court held that Eleventh Amendment immunity barred the suits against the PSCW and the PSCW Commissioners.

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4 Three new entrants sought to intervene in Ameritech Wisconsin's suit over the SGAT, but the district court denied the motions because it concluded that the PSCW would adequately represent the prospective intervenors' interests. The district court's denial of the motions to intervene is not before us on appeal.

(a)

In its first opinion, reported at *Wisconsin Bell, Inc. v. Public Serv. Comm'n,* 27 F. Supp. 2d 1149 (W.D. Wis. 1998), the district court granted the motions to dismiss. According to the court, the PSCW had not waived its immunity by performing its role under § 252 of the 1996 Telecommunications Act. Furthermore, the district court concluded that the suits against the PSCW Commissioners could not proceed under the *Ex parte Young* doctrine.

The district court first analyzed whether the PSCW and the PSCW Commissioners could have waived their immunity by acting on the interconnection agreements and SGAT at issue in the cases before it. In the court's estimation, Congress had made its intention sufficiently clear in the 1996 Telecommunications Act that state commissions would be subject to suit in federal court to defend their rulings. Nevertheless, the district court concluded, the Act did not obtain a valid, voluntary waiver of immunity from states. The court reached this conclusion after evaluating the Supreme Court's decisions in *Parden v. Terminal Railway of the Alabama State Docks Department,* 377 U.S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207 (1964), and *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare,* 411 U.S. 279, 36 L. Ed. 2d 251, 93 S. Ct. 1614 (1973), both of which concerned the so-called "constructive waiver" doctrine.

According to the district court, under these cases the constructive waiver doctrine could not apply to the 1996 Telecommunications Act for several reasons. First, the court noted that, despite the many changes in telecommunications

regulation wrought by the Act, the Act preserved the states' role as the primary regulators of local telephone service; the district court understood the Supreme Court's holding in *Employees* to preclude the application of the constructive waiver doctrine "when the federal government amends or enacts a law making a state subject to suit merely by continuing in existing activities to protect its citizens." 27 F. Supp. 2d at 1158 (citing *Employees,* 411 U.S. at 296 (Marshall, J., concurring)). The district court next observed that when state commissions are asked to review voluntarily negotiated interconnection agreements, state commissions must review that agreement "or accept the consequence that the agreement will go into effect without any form of government oversight." *Id.* Finally, the district court explained its view that "staying out of the interconnection process cannot be said to be a realistic option for a state commission" because the commission cannot be expected to abandon its mandate to protect the public interest. *Id.* For these reasons, the district court explained, any waiver obtained from Wisconsin under the Act could not have been voluntary.

The district court also determined that the *Ex parte Young* doctrine was inapplicable to these cases. The court reached this conclusion based on its reading of the Supreme Court's decision in *Seminole Tribe.* According to the district court, in order for it to determine whether application of the *Ex parte Young* doctrine was appropriate here, *Seminole Tribe* required the court to engage in a two-step inquiry. Thus, it analyzed (1) whether Congress created a remedy for the rights created in the 1996 Telecommunications Act and (2) whether the remedy created by Congress contemplated a suit against a state official. The district court never reached the second

aspect of this inquiry because it concluded that, with the Act, Congress had created an adequate remedy to secure federal rights such that *Seminole Tribe* precluded the application of the *Ex parte Young* doctrine in these cases. The district court explained that, although the remedy created in subsection 252(e)(6) was "much less 'detailed' " than the statutory remedy at issue in *Seminole Tribe,* the court believed that it would be improper simply to compare the two statutory schemes to see which one was more detailed. *Id.* at 1161. Rather, the court stated, "a 'simple' remedy may be all that is necessary to secure federal rights." *Id.* The district court concluded that Congress made a choice in the Act to limit the available remedy under § 252 "to having a commission's ruling tested in federal court." *Id.* This "limited review" scheme, said the court, allowed federal courts "to cure errors in federal law without subjecting state commissioners to the full remedial powers of a federal district court." *Id.* Under *Seminole Tribe,* the court concluded, the *Ex parte Young* doctrine could not be used here "because the remedy Congress chose secures federal rights adequately." *Id.* That Congress had chosen, as it turns out, an unconstitutional remedy did not change the result here, the district court explained, because under *Seminole Tribe* it was "prevented from 'rewriting the statutory scheme in order to approximate what [it thought] Congress might have wanted.' " *Id.* (quoting *Seminole Tribe,* 517 U.S. at 76).

**(b)**

Although the district court had ruled that the suits against the PSCW and the PSCW Commissioners should be dismissed, the court stayed the enforcement of its ruling pending further briefing and argument by the parties on whether

the PSCW and the PSCW Commissioners were necessary parties under Rule 19(b) of the Federal Rules of Civil Procedure. The district court also allowed the PSCW and the PSCW Commissioners to amend their answers to include a Tenth Amendment defense.

Before the district court issued an opinion addressing the remaining Rule 19(b) issues, however, we issued our initial decision in 98-2127. *See MCI Telecomms. Corp. v. Illinois Commerce Comm'n,* 168 F.3d 315, *amended by* 183 F.3d 558 (7th Cir. 1999). The district court ordered further briefing and argument from the parties on the effect our opinion had on the cases before the district court. Then, the Supreme Court issued its rulings in *Alden, College Savings* and *Florida Prepaid.* After hearing argument from the parties, the district court issued a final opinion, reported at *Wisconsin Bell, Inc. v. Public Serv. Comm'n,* 57 F. Supp. 2d 710 (W.D. Wis. 1999), dismissing the suits.

In this second ruling, the district court explained that our initial decision in 98-2127 was no longer controlling in light of the Supreme Court's intervening decision in *College Savings.* According to the district court, it was obligated to follow the most recent Supreme Court precedent, and *College Savings,* the court believed, compelled the dismissal of the suits against the PSCW and the PSCW Commissioners. The district court recognized that *College Savings* preserved "some apparent constructive waivers," such as when Congress provides a gift to a state in return for the state's waiver of immunity, but it concluded that the Supreme Court's decision precluded the finding of such a waiver in the context of the 1996 Telecommunications Act. *Id.* at 715. Instead, the court explained, "[t]here is no arguable basis to a claim that

equates a gift with a state's participation in the act's cooperative federalism (supervising the regulation of local telephone carriers in the state)." *Id.* Within the context of the 1996 Telecommunications Act, the district court explained, a state's acceptance of the "gift" of being able to participate in the interconnection process could not be equated with the kind of "gifts" found acceptable by the Supreme Court in *College Savings*. "A state's continued regulation of local enterprise (local telephone carriers)," the district court reasoned, "is an 'otherwise permissible activity' that can yield no inference as to a state's motivation for doing it." *Id.*

The district court also reaffirmed its prior ruling on the applicability of the *Ex parte Young* doctrine. In addition to the points it had raised in its first decision, the court further noted two other problems with proceeding under the *Ex parte Young* doctrine in these cases. First, the court noted that "one must acknowledge the conceptual difference between a state official performing state functions in a way that violates federal law and a state official who is performing federally authorized functions but is alleged to have performed those functions improperly." *Id.* at 713. Second, the court noted "the oddity" of allowing an *Ex parte Young* suit to proceed against individual commissioners, some of whom may have dissented from the decision being challenged in court. *Id.* In the end, however, the district court explained that, even if these hurdles to applying the *Ex parte Young* doctrine could be overcome, *Seminole Tribe* precluded the application of the doctrine to these cases because the 1996

Telecommunications Act provided a limited remedy for violations of the Act.[5]

## II. DISCUSSION

The Eleventh Amendment to the Constitution of the United States provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The Supreme Court has long held that this Amendment bars federal jurisdiction over suits brought against a state, not only by citizens of another state or a foreign state, but also by its own citizens. *See, e.g., College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 627, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999); *Edelman v. Jordan*, 415 U.S. 651, 662-63, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974); *Hans v. Louisiana*, 134

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5 In its second decision, the district court also held that, in light of this circuit's decision in *Illinois Bell Telephone Co. v. Worldcom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999), the PSCW and the PSCW Commissioners were necessary parties to these suits. Because the PSCW and the PSCW Commissioners were necessary parties and because the district court had concluded that they were entitled to immunity, the district court held that the cases had to be dismissed in their entirety for failure to join necessary parties. We hold today, however, that the PSCW and the PSCW Commissioners may be sued in federal court; thus, we need not address the Rule 19(b) arguments raised by the parties.

U.S. 1, 13-15, 33 L. Ed. 842, 10 S. Ct. 504 (1890). The immunity conferred on a state by the Eleventh Amendment extends to state agencies as well. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, 121 L. Ed. 2d 605, 113 S. Ct. 684 (1993). Subject to the exception carved out in *Ex parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), the Eleventh Amendment also bars federal jurisdiction over suits against state officials acting in their official capacities when the state is the real party in interest. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) *("Pennhurst II")*.

The immunity afforded to states by the Eleventh Amendment, however, is not absolute. *See College Savings*, 527 U.S. at 670. Congress may exercise its power under the Fourteenth Amendment and thereby authorize private suits against unconsenting states. *See id.; Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976). A state also may waive its immunity from suit. *See College Savings*, 527 U.S. at 670; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985); *Marie O. v. Edgar*, 131 F.3d 610, 615 (7th Cir. 1997). Additionally, the *Ex parte Young* doctrine allows private parties to sue individual state officials for prospective relief to enjoin ongoing violations of federal law. *See, e.g., Ex parte Young*, 209 U.S. at 159-60; *Dean Foods Co. v. Brancel*, 187 F.3d 609, 613 (7th Cir. 1999); *Marie O.*, 131 F.3d at 615.

We review de novo a district court's judgment on whether to dismiss a claim on Eleventh Amendment immunity grounds. *See Goshtasby v. Board of Trustees of the Univ. of Ill.*, 141 F.3d 761, 764 (7th Cir. 1998), *abrogated on other*

*grounds by Kimel v. Florida Bd. of Regents*, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000).

**A. Threshold Matters**

As a threshold matter, the ICC and the ICC Commissioners, relying on subsection 252(e)(6), submit that we need not concern ourselves with the application of the Eleventh Amendment because the 1996 Telecommunications Act does not even provide for suits against states in federal court, but instead provides only for federal court review of the interconnection agreements themselves. We cannot accept this contention; the provisions of the Act, read as a whole, will not permit such a construction and, indeed, make clear that Congress' intent was to the contrary.

At the outset, we note that the subsection providing for judicial review is titled "Review of State commission actions," not "Review of interconnection agreements," thus signaling that Congress intended that the state commissions be parties to the federal court suits reviewing their actions, just as the FCC is a party to suits seeking review of its actions. Moreover, subsection 252(e)(4), when read in conjunction with subsection 252(e)(6), provides additional evidence that Congress contemplated suits against state defendants in federal court. Subsection 252(e)(4) provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4) (Supp. II 1996). This language indicates that Congress envisioned suits reviewing "actions" by state commissions, as opposed to suits reviewing only the agreements themselves, and that Congress intended that such suits be brought exclusively in federal court.

In a similar vein, the PSCW and the PSCW Commissioners contend that we lack subject matter jurisdiction in case 99-2806 because that case involves the enforcement of previously approved interconnection agreements. According to the PSCW and the PSCW Commissioners, subsection 252(e)(6) does not confer jurisdiction on federal courts to review enforcement or other post-approval determinations made by state commissions. Instead, they submit, the plain language of subsection 252(e)(6) limits federal jurisdiction to reviewing a state commission's approval or rejection of an interconnection agreement or SGAT.

We decline to read subsection 252(e)(6) so narrowly. *See Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 479-81 (5th Cir. 2000). A state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by that commission. *See id.* at 479-80; *Iowa Utils. Bd. v. F.C.C.*, 120 F.3d 753, 804 & n.24 (8th Cir. 1997) (stating that "the state commissions' plenary authority to accept or reject these [interconnection] agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved"), *aff'd in part and rev'd in part on other grounds sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999).[6] In sum, we believe

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6 *See also Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd.*, 189 F.3d 1, 10 (1st Cir. 1999) (assuming, without deciding, that state commission interpretations and enforcements of agreements are subject to federal court review under subsection 252(e)(6)).

that subsection 252(e)(6) contemplates that state commissions will be parties to suits brought by those aggrieved by their determinations. This provision confers federal jurisdiction to review "state commission rulings on complaints pertaining to interconnection agreements and . . . such jurisdiction is not restricted to mere approval or rejection of such agreements." *Southwestern Bell,* 208 F.3d at 481; *see also Illinois Bell Tel. Co. v. Worldcom Techs.,Inc.,* 179 F.3d 566, 570-71 (7th Cir. 1999) (stating that federal courts have jurisdiction under subsection 252(e)(6) to review "actions" by state commissions that relate to interconnection agreements).

**B. Abrogation**

Unquestionably, Congress could not have abrogated state sovereign immunity with the 1996 Telecommunications Act. The Act is an exercise of Congress' Commerce Power under Article I of the Constitution, *see* 47 U.S.C. § 151 (Supp. II 1996), and as the Supreme Court has made inescapably clear, Congress may not abrogate Eleventh Amendment immunity through the exercise of its Article I powers. *See College Savings,* 527 U.S. at 672; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank,* 527 U.S. 627, 636, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999); *Seminole Tribe v. Florida,* 517 U.S. 44, 72, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996) ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."). Thus, because the states' immunity cannot be abrogated by the 1996 Telecommunications Act, we must look to whether Il-

linois and Wisconsin have waived their Eleventh Amendment immunity in the cases before us.

**C. Waiver**

**1.**

The decision to waive Eleventh Amendment immunity lies solely with the state, *see College Savings,* 527 U.S. at 675, and we "indulge every reasonable presumption against" a state's waiver of its immunity, *see id.* at 682 (quotation marks and citation omitted). Thus, the test "for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Id.* at 675 (quoting *Atascadero,* 473 U.S. at 241 (internal quotation marks omitted)). We may find that a state has waived its immunity when "the State voluntarily invokes" federal jurisdiction or when "th State makes a 'clear declaration' that it intends to submit itself" to federal jurisdiction. *College Savings,* 527 U.S. at 675-76 (citations omitted). In either case, there must be an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." *Atascadero,* 473 U.S. at 238 n.1; *see also College Savings* 527 U.S. at 680 ("The whole point of requiring a 'clear declaration' *by the State* of its waiver is to be certain that the State in fact consents to suit."); *Mueller v. Thompson,* 133 F.3d 1063, 1064 (7th Cir. 1998) ("No magic words are required, but implicit waivers won't do; the court must be highly confident that the state really did intend to allow itself to be sued in federal court." (citations omitted)).

**2.**

The Supreme Court's recent decisions in *Alden, College Savings* and *Florida Prepaid* have refined the jurisprudence with respect to state sovereign immunity. The Court's decisions in *Alden* and *Florida Prepaid,* although impacting Eleventh Amendment jurisprudence in other important ways, do not bear directly on the questions of waiver that we confront in our cases. In contrast, the Court's decision in *College Savings* is especially pertinent to our analysis here because that decision squarely addressed Congress' power to obtain waivers of state immunity when Congress acts within its Article I powers. In *College Savings,* the Court held that states do not "constructively" waive their sovereign immunity by engaging in activities in interstate commerce that are regulated by Congress under its Article I power. *See College Savings,* 527 U.S. at 680. By so holding, the Court overruled *Parden v. Terminal Railway of the Alabama Docks Department,* 377 U.S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207 (1964), a case in which the Court had held that Alabama waived its sovereign immunity by operating a railroad that was regulated by Congress under its Commerce Power.

At issue in *College Savings* was whether the state of Florida had "constructively" waived its immunity by marketing a college savings plan in interstate commerce. By an amendment to the Lanham Act[7], Congress had subjected states to suit in federal court for false representations in commerce, and the plaintiff, College Savings Bank, argued that Florida had waived its immunity by engaging in the activity regu-

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7 See 15 U.S.C. §§ 1122, 1125(a) (as amended by the Trademark Remedy Clarification Act, Pub. L. No. 102-542, § 3(b)-(c), 106 Stat. 3567, 3567-68 (1992)).

lated by that federal statute. The Supreme Court disagreed. According to the Court, Florida could not waive its immunity merely by engaging in the regulated activity because "there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation." *College Savings,* 527 U.S. at 680; *see also Burnette v. Carothers,* 192 F.3d 52, 60 (2d Cir. 1999) (holding, in a post-*College Savings* case, that a state did not consent to suit for CERCLA violations by operating a prison that had released toxic chemicals).

The commissions in our cases argue that the Court's decision in *College Savings* has eliminated all so-called "constructive" or "implied" waivers. We, however, cannot agree with their assessment of that case. The Court in *College Savings* limited its abandonment of "constructive" or "implied" waivers to the "ill conceived" "constructive-waiver experiment of *Parden.*" *College Savings,* 527 U.S. at 680. Indeed, the Court did not call into question other types of "constructive" waivers obtained by Congress acting within its Article I powers. Rather, the Court simply held that states cannot "constructively" waive their immunity by being forced by Congress to choose between preserving their sovereign immunity and engaging in an "otherwise lawful activity." *Id.* at 687.

To illustrate the types of "constructive" waivers that Congress may still obtain from states, the Court provided two examples of constructive waivers that are "fundamentally different" from *Parden*-style waivers and that are viable after *College Savings. Id.* at 686. In the first example, *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275, 3 L. Ed. 2d 804, 79 S. Ct. 785 (1959), Congress required Tennes-

see and Missouri to waive their immunity as a condition for Congress' approval of the interstate compact made between the two states. The Court in *College Savings* explained that the constructive waiver exacted by Congress in that case was valid because, under the Compact Clause of the Constitution, states cannot form interstate compacts without congressional approval. As the Court explained it, Congress' consent to an interstate compact is a "gratuity" that Congress could give or withhold. *College Savings*, 527 U.S. at 686.

In the second example, *South Dakota v. Dole*, 483 U.S. 203, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987), the Court held that Congress could impose conditions on a state's acceptance of federal funds allocated under the Spending Power. In *Dole*, Congress had conditioned the allocation of federal highway funds on South Dakota's raising its drinking age. The Court in *College Savings* explained that its holding in *Dole* made clear that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." *College Savings*, 527 U.S. at 686. Just as it was a "gratuity" for Congress to approve an interstate compact, the Court in College Savings noted that federal funds were a "gift" from Congress that it was under no obligation to give. *Id.* at 686-87.

Because the Court in *College Savings* endorsed some kinds of "constructive" waivers, we cannot accept the commissions' argument that all constructive waivers are now foreclosed. We instead understand the Court's holding in *College Savings* to set boundaries for congressional attempts to obtain waivers from states. *See id.* at 690 (stating that "our

opinion today has sought to discern what the bounds [of federal power] are"). In *Seminole Tribe*, the Court had held that Congress could not abrogate state sovereign immunity through the exercise of its Article I powers. *Parden*-style waivers--in which a state was deemed to have waived its immunity simply by engaging in an activity regulated by Congress in the exercise of its Article I powers--nevertheless effectively allowed Congress to circumvent the holding of *Seminole Tribe*. *See id.* at 683. As the Court explained in *College Savings*, the type of "forced waiver" exacted by Congress under *Parden*, whereby the state is threatened with the sanction of waiving its immunity if it engages in a regulated enterprise, was really an abrogation of the state's immunity prohibited by *Seminole Tribe*. *See id.* (noting that forced waiver and abrogation are "the same side of the same coin"); *see also Chavez v. Arte Publico Press*, 204 F.3d 601, 604 n.5 (5th Cir. 2000) *("College Savings* expressly overruled *Parden* and its implied waiver theory. That theory is no longer available to support an Article I *abrogation* of Eleventh Amendment Immunity." (emphasis added) (citation omitted)). The Court's decision in *College Savings* closed the "forced waiver" loophole left open by *Parden*.

With these principles in mind, we shall now turn to the cases before us to examine whether there is a valid waiver.

3.

We first examine, as a threshold matter, whether Congress, in inviting the states to waive their Eleventh Amendment immunity, has done so with sufficient clarity. When it intends to obtain a waiver of immunity from the states, Congress must "speak with a clear voice" so that the states may

exercise their choice to waive their immunity "knowingly, cognizant of the consequences of their participation." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981) *("Pennhurst I"); accord Atascadero*, 473 U.S. at 238-40 (stating that the Court has required "an unequivocal expression of congressional intent" to obtain an Eleventh Amendment waiver from states (citation omitted)); *see also Dole*, 483 U.S. at 207 (quoting *Pennhurst I* and stating that Congress must state the condition "'unambiguously'").

The commissions submit that there can be no waiver of sovereign immunity in these cases because the language of the 1996 Telecommunications Act contains no clear and unambiguous expression of Congress' intent to condition the states' participation in the Act's regulatory scheme on their consent to suit in federal court. The commissions point out that the Act does not even mention sovereign immunity or indicate an intent to give states a choice between carrying out their responsibilities under the Act or retaining their sovereign immunity by letting the FCC fulfill their responsibilities. The absence of these elements from the statutory language negates, in the commissions' view, any possibility of a valid waiver; the statutory language contains no explicit manifestation that Congress clearly intended to condition the states' participation under the Act on their waiver of sovereign immunity.

We cannot accept this argument. Although the language of the statute does not contain the express waiver language that the commissions seek, the structure of the pertinent section of the statute, notably 47 U.S.C. § 252 (Supp. II 1996), nevertheless makes clear that Congress intended to provide for

federal court review of any regulatory determination made under the section, whether by a state commission or, if the state commission chooses not to act, by the FCC acting in its place. Section 252 first describes the duties of the carriers seeking to enter into an interconnection agreement and then details the role of the state commissions in the mediation, arbitration and review process. It sets forth the standards by which the state commissions may impose terms upon the parties to the interconnection agreements during arbitration as well as the standards by which the state commissions must approve or reject an agreement. Subsection 252(e)(5) then provides that, if a state commission does not carry out its responsibilities under § 252, the FCC will act in place of the state commission. Subsection 252(e)(6), titled "Review of State commission actions," then provides that the exclusive remedy for a state commission's failure to act will be the proceedings before the FCC and any judicial review of the FCC's actions. It further provides that any party aggrieved by a state commission's determination under § 252 may obtain review "in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 [and section 252]." 47 U.S.C. § 252(e)(6) (Supp. II 1996).

Thus, under the terms of § 252, the state commission or, if that body chooses not to act, the FCC will exercise regulatory authority over interconnection agreements. That administrative action, whether taken by a state administrative tribunal or by the FCC, is subject to review in federal court. If the reviewing body is a state commission, the statute provides that the commission's actions are reviewable in federal court under subsection 252(e)(6); if the reviewing body is the

FCC, its actions are reviewable in federal court under 28 U.S.C. § 2342(1). In short, Congress has expressed unmistakably that, under the 1996 Telecommunications Act, states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court. We therefore conclude that the 1996 Telecommunications Act satisfies the requirement that Congress clearly state that participation by the state in the regulatory scheme entails a waiver of immunity from suit in federal court. *Accord MCI Telecomms. Corp. v. Public Serv. Comm'n,* 2000 U.S. App. LEXIS 14348, No. 99-4203, 2000 WL 783382, at *8 (10th Cir. June 20, 2000) (concluding that § 252 puts states on notice that Congress intends to subject them to suit in federal court if they act under § 252).

**4.**

We now turn to the question of whether the states have unequivocally waived their Eleventh Amendment immunity. As the Supreme Court has noted, there is "a fundamental difference" between "Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived [its] immunity" and "a State's expressing unequivocally that it waives its immunity." *College Savings,* 527 U.S. at 680-81. Therefore, we must determine whether the states made a clear declaration that they desired to waive their immunity.

The carriers do not contend that Illinois or Wisconsin waived their immunity by statute. Rather, they maintain that these states have waived their Eleventh Amendment immunity by accepting the federal government's invitation to act

as regulators of the local telephone market in accordance with § 252 of the 1996 Telecommunications Act. We agree with that assessment and therefore hold, as the Tenth Circuit held in *MCI Telecommunications Corp. v. Public Service Commission*, 2000 U.S. App. LEXIS 14348, No. 99-4203, 2000 WL 783382, (10th Cir. June 20, 2000), that states voluntarily waive their sovereign immunity by accepting that invitation.

The commissions endeavor to distinguish the *Petty*- and *Dole*-style waivers endorsed by the Supreme Court in *College Savings* from the situations in the cases before us. According to the commissions, the waivers obtained by the 1996 Telecommunications Act are fundamentally different than those in *Petty* and *Dole*. They point out that *Petty* involved Congress' Compact Power and *Dole* its Spending Power, while the 1996 Telecommunications Act is an exercise of Congress' Commerce Power. We do not believe that this distinction is helpful to the analysis required by *College Savings*. In *College Savings*, the Supreme Court's analysis did not hinge on whether Congress was acting within its Commerce or Spending or Compact Powers, all of which are Article I powers. Rather, the validity of a purported waiver turns on whether the waiver is conditioned on the state's truly voluntary acceptance of a federal "gratuity." *Accord Public Serv. Comm'n*, 2000 U.S. App. LEXIS 14348, *19, 2000 WL 783382, at *7 ("[F]or a constructive waiver of sovereign immunity to be valid under *College Savings Bank*, it must be altogether voluntary and not forced from a state by Congress."). The significant commonality between *Dole* and *Petty* is *not* that each involved a power other than the Commerce Power; the key in those cases was that Congress had

the prerogative to bestow a gratuity and that, by accepting the gratuity, the states agreed to undertake certain actions that Congress could not otherwise have required them to take.

It is clear that Congress, in exercising its Commerce Power, *could* determine that all regulation of the telecommunications industry ought to be entrusted to the federal government. *See F.E.R.C. v. Mississippi,* 456 U.S. 742, 764, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982) ("[T]he commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities."); *Public Serv. Comm'n,* 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *8. And with the 1996 Telecommunications Act, we believe it equally clear that Congress *did* take over some aspects of the telecommunications industry. *See AT&T Corp.,* 525 U.S. at 378-79 n.6 (stating that, as to those aspects addressed by the 1996 Telecommunications Act, Congress has "unquestionably" taken the regulation of local telecommunications competition away from the states); *Public Serv. Comm'n,* 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *8. Although Congress cannot abrogate state sovereign immunity by exercising its Article I powers, *see Seminole Tribe,* 517 U.S. at 72-73, and cannot "commandeer" state regulatory agencies with legislation forcing them to regulate on behalf of Congress, *see Printz v. United States,* 521 U.S. 898, 935, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997); *New York v. United States,* 505 U.S. 144, 168, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992), these limitations on congressional power do not prohibit Congress from obtaining a state's voluntary consent to federal jurisdiction. With the 1996 Telecommunications Act, Congress has created a complex federal regulatory scheme

for many aspects of the telecommunications industry. One component of that scheme is the invitation from Congress to the states to participate in the federal regulation of interconnection agreements and other aspects of the local telephone market. Congress certainly had the power to take up the regulation of these areas on its own, and it certainly can invite the states to act on its behalf in carrying out those regulatory functions.

After the 1996 Telecommunications Act, the regulation of interconnection agreements and the approval of SGATs are no longer, in the terms employed by the Supreme Court in *College Savings*, "otherwise permissible activities" for the states. 527 U.S. at 687; *cf. Public Serv. Comm'n*, 2000 U.S. App. LEXIS 14348, *23-24, 2000 WL 783382, at *8 ("[W]ith the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity."). Congress, exercising its authority to regulate commerce has precluded all other regulation except on its terms. Unlike the situation in *Parden* and in *College Savings*, the states are not merely acting in an area regulated by Congress; they are now voluntarily *regulating on behalf of Congress*.[8] Unlike the

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8 *See also Public Serv. Comm'n*, 2000 U.S. App. LEXIS 14348, *21, 2000 WL 783382, at *8 (" 47 U.S.C.A. § 252 invites states to participate in the federal government's regulation of local telephone service."); Peter W. Huber et al., *Federal Telecommunications Law* § 3.3.4, at 227 (2d ed. 1999) ("As a backdrop to its primary reliance on privately negotiated agreements, however, Congress enlisted the aid of state public utility commissions to ensure that local competition was implemented fairly and with due

situation in *Parden,* in which Alabama exercised its sovereign authority to operate a railroad, the state commissions have conducted arbitrations for interconnection agreements, have approved and enforced those agreements, and have acted on an SGAT under a federal grant of power. Their authority to act was derived from provisions of the Act and not from their own sovereign authority.

The commissions submit that the waivers in our cases cannot be likened to the kind of waiver obtained by Congress in the exercise of its Spending Power. This is so, the commissions tell us, because with Spending Clause waivers the states effectively enter into a "contract" with Congress--in exchange for the federal funding, the state agrees to the terms offered by Congress. We think that the commissions' analogy, however, tends to support, rather than weaken, our conclusion. The state commissions have entered into the same kind of exchange with Congress that takes place when Congress offers federal funds conditioned on a state's acceptance of the federal terms.[9] The only difference between the

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regard to the local conditions and the particular historical circumstances of local regulation under the prior regime.").

9 *Cf. Litman v. George Mason Univ.,* 186 F.3d 544, 555 (4th Cir. 1999) (holding that a public university had waived its immunity by accepting Title IX funding and thus agreeing to the condition of waiver Congress had attached to those funds), *cert. denied,* 145 L. Ed. 2d 1120, 120 S. Ct. 1220 (2000); *In re Innes,* 184 F.3d 1275, 1284 (10th Cir. 1999) (holding that a state had waived voluntarily its immunity by agreeing to participate in the federal Perkins Loan Program, a federal program in which states are required to undertake certain actions in federal bankruptcy court proceedings), *cert. denied,* 146 L. Ed. 2d 345, 120 S. Ct. 1530 (2000).

classic example of a Spending Clause gratuity of federal funds and the waivers in our cases is that, with the 1996 Telecommunications Act, Congress has offered the states, not federal funds, but a role as what the carriers have called a "deputized" federal regulator. In exchange for this grant of regulatory power, Congress has required the states to agree to submit to federal jurisdiction to review their actions. In *Dole,* the gratuity was money; the condition was a higher drinking age. Here, the gratuity is federal regulatory power; the condition is waiver of the state's immunity. Having accepted the regulatory power offered by Congress, Illinois and Wisconsin now must accept the condition that was attached to that grant of power. *Cf. Board of Educ. of Oak Park v. Kelly E.,* 207 F.3d 931, 935 (7th Cir. 2000) (noting that "[o]ne string attached to money under the IDEA is submitting to suit in federal court" and holding that "having accepted the money, [states] must litigate in federal court"), *petition for cert. filed,* 69 U.S.L.W. 3001 (U.S. June 16, 2000) (No. 99-2027).[10]

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10 It has been suggested to us that the commissioners do not have the power to waive the immunity of their respective states; that only the state legislatures can waive their states' Eleventh Amendment immunity. We believe, however, that the waivers of immunity have come from the states themselves (and not the commissions). It is the states that have authorized the commissions to regulate the telecommunications industry, *see* Ill. Comp. Stat. 5 2-101; Wis. Stat. § 196.02, and, despite the clear warning from Congress in subsection 252(e)(6) of the 1996 Telecommunications Act, neither Illinois nor Wisconsin have taken any steps to forbid their respective commissions from exercising the authority granted to them by Congress. Indeed, the states have agreed unmistakably

We believe that *College Savings* does not alter the principle that states may waive their immunity by accepting a benefit from Congress that has conditions attached to that acceptance.[11] Congress could--and did--take over regulation of a part of the telecommunications industry in accordance with its Commerce Power. Such regulation is no longer an "otherwise permissible activity" for states. Congress may choose to "give back" to states some of the regulatory power Congress has taken away, and Congress may attach conditions to the return of that power. *Cf. College Savings,* 527 U.S. at 686-87 (explaining that, when Congress bestows a gift or gratuity, it may attach conditions to a state's acceptance of that gift or gratuity). States are free to accept or reject the terms Congress has offered the states if they want a contin-

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and affirmatively to waive their immunity. By accepting the grant of regulatory power offered by Congress, and by allowing the state commissions to exercise that power, Illinois and Wisconsin cannot contend now that they are not bound by the conditions attached to that grant of power.

11 At one time, privately negotiated agreements were at issue in a case before us. But as we have explained, *supra* note 3, we have granted Ameritech Illinois' motion to remand 98-2256 to the district court for a voluntary dismissal with prejudice. We therefore need not decide--and reserve for another day--whether a state commission might have no true choice but to involve itself in the review process of a privately negotiated interconnection agreement in order to avoid the consequence of having the agreement be "deemed approved" under 47 U.S.C. § 252(e)(4) (Supp. II 1996). *Cf. College Savings,* 527 U.S. at 687 (stating that, in some instances, the inducement offered by Congress might be so coercive that the voluntariness of the waiver is destroyed).

ued role in regulating this segment of the local telephone service market.[12]

**D. *Ex parte Young***

**1.**

As an independent basis for decision, we also believe that the Eleventh Amendment does not bar the carriers from pursuing injunctive relief against the individual members of the state commissions. Under the *Ex parte Young* doctrine, a private party may sue individual state officials in federal court to obtain prospective relief for an ongoing violation of federal law. *See Ex parte Young,* 209 U.S. at 159-60; *Idaho v. Coeur d' Alene Tribe,* 521 U.S. 261, 294, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997) (O'Connor, J., concurring); *id.* at

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12 We are not unmindful that our colleagues in the Sixth Circuit have expressed the view that, in light of the Supreme Court's decisions in *College Savings* and *Florida Prepaid,* "it is virtually certain that a state utility commission's decision to accept regulatory authority under the [1996 Telecommunications Act] cannot legitimately be construed as a valid waiver of sovereign immunity." *GTE North, Inc. v. Strand,* 209 F.3d 909, 922 n.6 (6th Cir. 2000); *see also Michigan Bell Tel. Co. v. Climax Tel. Co.,* 202 F.3d 862, 867 & n.2 (6th Cir. 2000) (declining to find that the state had waived its immunity by regulating under the Act and instead relying on the *Ex parte Young* doctrine to allow suits against individual state commissioners), *petition for cert. filed,* 68 U.S.L.W. 3742 (U.S. May 15, 2000) (No. 99-1878). As we have already indicated, however, we believe that the Court of Appeals for the Tenth Circuit has expressed the correct view, and we agree with its analysis. *See Public Serv. Comm'n,* 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *8.

298-99 (Souter, J., dissenting) ("The plaintiff must allege that the officers are acting in violation of federal law, and must seek prospective relief to address an ongoing violation, not compensation or other retrospective relief for violations past." (internal citation and footnote omitted)); *Marie O.*, 131 F.3d at 615. Under this doctrine, federal courts are enabled to "vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " *Pennhurst II*, 465 U.S. at 105 (quoting *Ex parte Young*, 209 U.S. at 160).[13] The Supreme Court's decisions in *Alden*, *College Savings* and *Florida Prepaid* have not called the *Ex parte Young* doctrine into question. Indeed, the Court in *Alden* reaffirmed the doctrine's role in the sovereign immunity context. *See Alden v. Maine*, 527 U.S. 706, 748, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999) (calling the *Ex parte Young* doctrine an "essential" part of the Court's sovereign immunity jurisprudence).

We agree with the Sixth and Tenth Circuits that these suits are "straightforward" *Ex parte Young* cases. *Public Serv. Comm'n*, 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *9 (holding that state commissioners may be sued under the *Ex parte Young* doctrine for their approval and enforcement of a § 252 interconnection agreement); *Michigan Bell Tel. Co.*, 202 F.3d at 867 (same). The carriers seek injunctive relief from what they allege to be determinations made by the commissioners that are contrary to the 1996 Telecommunications Act. The commissioners argue that, if any viola-

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13 The *Ex parte Young* doctrine may not be used to enjoin violations of state law. *See Pennhurst II*, 465 U.S. at 106.

tions occurred, they occurred in the past, and that therefore the *Ex parte Young* doctrine should not apply. We cannot accept this argument. The challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law. *See Entergy, Arkansas, Inc. v. Nebraska*, 210 F.3d 887, 898 (8th Cir. 2000) ("While the relief granted under *Ex parte Young* may only be prospective, proof for the claim necessitating relief can be based on historical facts, and most often will be."). Such relief is precisely the type contemplated by the *Ex parte Young* doctrine. Thus, the carriers' suits fit squarely within the traditional framework of *Ex parte Young*.

2.

The commissioners submit that the Supreme Court's decision in *Seminole Tribe* renders the *Ex parte Young* doctrine inapplicable to the cases before us. In *Seminole Tribe*, the Supreme Court admonished that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole Tribe*, 517 U.S. at 74. According to the commissioners, Congress has created in § 252 a "detailed remedial scheme" that is on par with the remedial scheme at issue in *Seminole Tribe*. Consequently, the commissioners argue, an *Ex parte Young* suit against them would run afoul of the Court's decision in *Seminole Tribe*.

We cannot accept the commissioners' characterization of the available remedies under the 1996 Telecommunications

Act and, consequently, find their analogy to the situation in *Seminole Tribe* to be flawed. Section 252 of the Act does not create a "detailed remedial scheme" that manifests Congress' intent to limit the scope of statutory remedies available to parties aggrieved by the commissioners' interconnection determinations. The enforcement provision implicated in our cases merely states: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 [and section 252]." 47 U.S.C. § 252(e)(6) (Supp. II 1996). The power of the court under subsection 252(e)(6) stands in stark contrast with the court's powers to impose what the Supreme Court called a "modest set of sanctions" under the statute at issue in *Seminole Tribe*. *Seminole Tribe*, 517 U.S. at 75.

In *Seminole Tribe*, the Court addressed the judicial enforcement scheme created by the Indian Gaming Regulatory Act ("the IGRA"). Congress had passed the IGRA in 1988 in order to provide a statutory framework for the operation and regulation of tribal gaming operations. Under the IGRA, Indian tribes could enter into the most heavily regulated class of gaming (*i.e.*, slot machines, casino games, banking card games, dog racing, and lotteries) only after certain conditions had been met. One of those conditions imposed by the IGRA was that the tribe's operations had to conform to a valid compact between the tribe and the state in which the gaming operations were located. *See* 25 U.S.C. § 2710(d)(1).

The IGRA set forth the process by which tribes and states were to enter into these compacts. First, a tribe was required

to request that the state enter into compact negotiations. Once a request had been made, the state was obligated under the IGRA to "negotiate with the Indian tribe in good faith" to enter into a compact. *Id.* § 2710(d)(3)(A). Still other provisions of the IGRA made the state's obligation to negotiate in good faith judicially enforceable. *See id.* § 2710(d)(7)(A)(i) and (B)(i). Other provisions set forth what the Supreme Court described as "an elaborate remedial scheme" designed to ensure that a Tribal-State compact would be formed. *See id.* § 2710(d)(7)(B)(ii)-(vii).[14] Under this scheme, if the dis-

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14 To illustrate the elaborate nature of this remedial scheme, we shall set out the Supreme Court's full description of it: Sections 2710(d)(7)(B)(ii)-(vii) describe an elaborate remedial scheme designed to ensure the formation of a Tribal-State compact. A tribe that brings an action under § 2710(d)(7)(A)(i) must show that no Tribal-State compact has been entered and that the State failed to respond in good faith to the tribe's request to negotiate; at that point, the burden then shifts to the State to prove that it did in fact negotiate in good faith. § 2710(d)(7)(B)(ii). If the district court concludes that the State has failed to negotiate in good faith toward the formation of a Tribal-State compact, then it "shall order the State and Indian Tribe to conclude such a compact within a 60-day period." § 2710(d)(7)(B)(iii). If no compact has been concluded 60 days after the court's order, then "the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact." § 2710(d)(7) (B)(iv). The mediator chooses from between the two proposed compacts the one "which best comports with the terms of the Act and any other applicable Federal law and with the findings and order of the court," *ibid.*, and submits it to the State and the Indian tribe, § 2710(d)(7)(B)(v). If the State consents to

trict court determined that the state had failed to negotiate in good faith, the IGRA only allowed the court to issue an order mandating that the tribe and the state enter into a compact within 60 days. *See Seminole Tribe,* 517 U.S. at 74. If the parties disregarded this order, the only recourse available to the district court was to order each party to submit a proposed compact to a mediator, who would then choose one. *See id.* at 74. And if the state refused to accept the compact chosen by the mediator, the IGRA provided that the mediator was to inform the U.S. Secretary of the Interior, who would then issue regulations to govern the tribe's gaming operations. *See id.* at 74-75.

Unlike the IGRA, in which "Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young,*" *Seminole Tribe,* 517 U.S. at 75-76, Congress has not limited the court's remedial power under subsection 252(e)(6) of the 1996 Telecommunications Act. We reach this conclusion guided by our decision in *Marie O. v. Edgar,* 131 F.3d 610 (7th Cir. 1997). In *Marie O.,* a case

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the proposed compact within 60 days of its submission by the mediator, then the proposed compact is "treated as a Tribal-State compact entered into under paragraph (3)." § 2710(d)(7)(B)(vi). If, however, the State does not consent within that 60-day period, then the Act provides that the mediator "shall notify the Secretary of the Interior" and that the Secretary "shall prescribe procedures under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction." § 2710(d)(7)(B)(vii). *Seminole Tribe,* 517 U.S. at 50.

decided in the wake of *Seminole Tribe,* we held that the Individuals with Disabilities Education Act ("the IDEA") did not contain an "explicit remedial scheme" that would prevent an *Ex parte Young* suit. *Marie O.,* 131 F.3d at 616. The IDEA section involved in that case empowered a district court to grant " 'such relief as it determines is appropriate' " to ensure compliance with certain provisions of the IDEA. *Id.* (quoting 20 U.S.C. § 1480(1)). Importantly, we noted that the remedial measures available under the IDEA did not expressly limit the role of the district court in redressing complaints with regard to the IDEA. Similarly, subsection 252(e)(6) does not limit the role or the power of the district court. Quite the contrary, subsection 252(e)(6) is silent as to how a district court would enforce its ruling under that section. Thus, we hold that *Seminole Tribe* does not preclude an *Ex parte Young* suit against the state commissioners here.

3.

Nor can we accept the contention that the Supreme Court's decision in *Coeur d'Alene Tribe* bars *Ex parte Young* suits by the carriers against the commissioners. The commissioners maintain that *Ex parte Young* suits against them would trammel "special sovereignty interests" of their states and, thus, should be precluded by *Coeur d'Alene Tribe.*

In *Coeur d'Alene Tribe,* a majority of the Court held that a federal court cannot grant prospective equitable relief under the *Ex parte Young* doctrine when that relief would implicate "special sovereignty interests" of the state and would be the "functional equivalent" to a form of legal relief otherwise barred by the Eleventh Amendment. *Coeur d' Alene Tribe,* 521 U.S. at 281-82. More precisely, the Court held that the

*Ex parte Young* doctrine was inapplicable to the "particular and special circumstances" present in that case. *Id.* at 287. A majority of the Court held that the lawsuit against Idaho could not proceed under the *Ex parte Young* doctrine because the suit, in which the Coeur d'Alene Tribe sought to have the federal court divest the state of its ownership of land under Lake Coeur d'Alene, in essence would affect "Idaho's sovereign interest in its lands and waters" to a degree "fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Id.* at 287; *see also id.* at 296 (O'Connor, J., concurring) (agreeing that the *Ex parte Young* doctrine should not be extended to reach the Tribe's claim "to quiet title to sovereign lands" because such a lawsuit is really a suit against the state). The Court explained that the Tribe's lawsuit could not proceed under the *Ex parte Young* doctrine because the suit was the "functional equivalent of a quiet title action which implicates special sovereignty interests." *Id.* at 281.

Illinois' and Wisconsin's interests in the regulation of telecommunications providers in their respective states cannot be equated with Idaho's interest in its land, which the Court in *Coeur d'Alene Tribe* found so fundamental. In the wake of the 1996 Telecommunications Act, any "sovereign" interest Illinois and Wisconsin may have in regulating interconnection agreements and SGATs is derived solely from the regulatory role Congress has bestowed upon the states. Thus, the suits against the state commissioners to require compliance with the 1996 Telecommunications Act do not strike at core functions or fundamental powers of either Illi-

nois or Wisconsin.[15] Therefore, the availability of an *Ex parte Young* suit in our cases is not affected by the special limitation recognized by a majority of the Court in *Coeur d' Alene Tribe. Accord Public Serv. Comm'n,* 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *9 n.8.

**Conclusion**

We hold that, by deciding to exercise the power delegated to them by the Act, the states agreed to the conditions attached to that grant of power and thereby waived their Elev-

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15 *Compare J.B. ex rel. Hart v. Valdez,* 186 F.3d 1280, 1287 (10th Cir. 1999) (holding that "[a] state's interest in administering a welfare program at least partially funded by the federal government is not such a core sovereign interest as to preclude the application of *Ex parte Young"), and Branson Sch. Dist. RE-82 v. Romer,* 161 F.3d 619, 632-33 (10th Cir. 1998) (holding that an action, which was "the functional equivalent of a breach of trust action" against the state for planned changes to its management of public lands, was within the scope of the *Ex parte Young* doctrine because the relief sought would not alter the nature of the state's ownership in the land but would affect only the manner in which the state managed the lands at issue), *cert. denied,* 119 S. Ct. 1461 (1999), *with MacDonald v. Village of Northport,* 164 F.3d 964, 972 (6th Cir. 1999) (holding that a state's "great interest in maintaining access to the Great Lakes" was a "special sovereignty interest" that precluded an *Ex parte Young* suit), *and ANR Pipeline Co. v. LaFaver,* 150 F.3d 1178, 1193 (10th Cir. 1998) (holding that a state's power to tax is akin to the "special sovereignty interests" identified in *Coeur d'Alene Tribe), cert. denied,* 525 U.S. 1122, 142 L. Ed. 2d 902, 119 S. Ct. 904 (1999).

enth Amendment immunity from suit in federal court. The federal regulatory scheme set forth in §§ 251 and 252 of the Act bestowed upon states a "gratuity." Acceptance of that federal invitation to share in the regulation of the telecommunications industry is conditioned on a waiver of Eleventh Amendment immunity. A state's decision to exercise that regulatory authority--which would otherwise lie with the federal government--necessarily constitutes a waiver of its immunity from suit in federal court.

We also hold that, under *Ex parte Young*, the Eleventh Amendment does not bar the carriers' lawsuits against the individual commissioners. Because the carriers have alleged ongoing violations of federal law and because they seek prospective equitable relief, their lawsuits fit squarely within the traditional framework of *Ex parte Young*. Moreover, the more recent limitations on *Ex parte Young* suits that the Supreme Court announced in *Seminole Tribe* and *Coeur d'Alene Tribe* are not applicable here. The 1996 Telecommunications Act does not contain a specific remedial scheme, and these lawsuits do not implicate special sovereignty interests.

Accordingly, we affirm the judgment of the district court in 98-2127. We reverse the judgment of the district court in 99-2805, 99-2806, 99-2811, 99-2873, and 99-2992, and we remand these cases to the district court for further proceedings consistent with this opinion.

98-2127 AFFIRMED;

99-2805, 99-2806, 99-2811, 99-2873 & 99-2992 REVERSED and REMANDED

**APPENDIX B – OPINION IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DECIDED FEBRUARY 10, 1999**

In the
United States Court of Appeals
For the Seventh Circuit

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No. 98-2127

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MCI TELECOMMUNICATIONS CORPORATION, a Delaware Corporation, and MCI METRO ACCESS TRANSMISSION SERVICES, INCORPORATED, a Delaware Corporation,

*Plaintiffs-Appellees,*

and

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

*Intervenors-Appellees,*

v.

ILLINOIS COMMERCE COMMISSION, TERRY HARVILL, RUTH K. KRETSCHMER, in their official capacities as Commissioners of the IL Commerce Commission, *et al.*,

*Defendants-Appellants.*

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No. 98-2256

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ILLINOIS BELL TELEPHONE COMPANY, doing business as AMERITECH ILLINOIS,

*Plaintiff-Appellee,*

and

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

*Intervenors-Appellees,*

v.

TERRY HARVILL, RICHARD KOLHAUSER, RUTH K. KRETSCHMER, in their official capacities as Commissioners of the Illinois Commerce Commission and not as individuals, et al.,

*Defendants-Appellants.*

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Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 97 C 2225; 97 C 8285--**David H. Coar,** *Judge.*

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ARGUED NOVEMBER 6, 1998--
DECIDED FEBRUARY 10, 1999
AMENDED JUNE 23, 1999*

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Before RIPPLE, KANNE and Diane P. WOOD, Circuit Judges.

RIPPLE, Circuit Judge. The plaintiff telephone companies brought this action against the Illinois Commerce Commission and various individual Commissioners. The companies

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* This opinion is being released in typescript form.

alleged violations of the Telecommunications Act of 1996 in connection with the defendants' arbitration and approval of the companies' interconnection agreements.[1] The defendants now seek review of the district court's denial of their motions to dismiss each case on Eleventh Amendment grounds. For the reasons set forth in the following opinion, we affirm the judgment of the district court in 98-2127.[2]

## I

## BACKGROUND

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1 By order of this court, AT&T Communications v. Illinois Bell (Case No. 98-2566), originally a part of this consolidated appeal, has been remanded to the district court to permit the district court to grant voluntary dismissal to AT&T.

2 This opinion was originally issued on February 10, 1999. In its petition for rehearing in 98-2256, the Illinois Commerce Commission parties noted a factual inaccuracy in our opinion. This case did include interconnection agreements made through private negotiations without mediation or arbitration by a state commission. We therefore amend the opinion to reflect this misstatement. As noted in the text of this amended opinion, this correction does not alter the result in this case. During the pendency of the petition for rehearing, Ameritech filed a motion requesting that we remand case 98-2256 to the district court so that it may be dismissed voluntarily with prejudice. We have granted that motion and therefore need not address the applicability of the Eleventh Amendment to litigation involving such privately negotiated agreements. We note, moreover, that the argument that the Illinois Commerce Commission parties made in the petition for rehearing was not presented with sufficient specificity in their brief before this court.

**A. The Statutory Scheme**

Congress enacted the Telecommunications Act of 1996 ("the Act") "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996). The Act seeks to introduce competition into local telephone service markets by ending the historic monopoly held by incumbent local exchange carriers ("LECs"). Congress recognized that, even after the removal of regulatory restrictions on competition, significant economic barriers would remain to block entry into local telephone markets. Prospective market entrants would face the cost of duplicating an incumbent provider's local network infrastructure. To remove this economic barrier, the Act essentially requires incumbent LECs to share their networks with competitors. Section 251 of the Act requires incumbent LECs to allow new entrants to interconnect with existing local networks, to lease elements of existing local networks at reasonable rates, and to purchase the incumbents' services at wholesale rates and resell those services to retail customers. *See* 47 U.S.C. sec. 251.

Section 252 sets out the process by which incumbent LECs and prospective carriers establish interconnection agreements. First, incumbent LECs and prospective carriers must negotiate in good faith to reach voluntary interconnection agreements. At any time during the negotiations, a party may ask a state commission to participate as a mediator in the negotiations. *See* 47 U.S.C. sec. 252(a)(2). If negotiations prove unsuccessful, subsection 252(b) provides for compulsory arbitration of any open issues. During the period from

the 135th to the 160th day after an incumbent LEC receives a request for negotiation, any party to the negotiation may petition a state commission to arbitrate any open issues. Sections 251 and 252 establish certain standards that the state commission must follow in resolving open issues by arbitration and in imposing conditions on the parties. The state commission is also bound by FCC regulations issued pursuant to sec. 251.

Subsection 252(e) requires any interconnection agreement reached by negotiation or arbitration to be submitted to the state commission for approval and specifies the grounds on which a state commission can reject an agreement. Subsection 252(e)(5) further provides that, if a state commission fails to carry out any of its responsibilities under this section, then the FCC will preempt the state commission's jurisdiction, assume responsibility for the proceeding, and act for the state commission in carrying out its functions.

An implementing regulation to sec. 252 provides that a state commission "fails to act" for purposes of subsection 252(e)(5)--thus prompting the FCC to step in and assume the state commission's responsibilities--if it fails to respond within a reasonable time to a request for mediation or a request for arbitration, or if it fails to complete an arbitration within the established time limits. *See* 47 C.F.R. sec. 51.801. A state commission will not be deemed to have failed to act, however, if it merely fails to approve or reject an agreement within the established time limits. *See id.* In such a case, the agreement will be deemed approved. *See* 47 U.S.C. sec. 252(e)(4).

Therefore, subsections 252(e)(4) and (e)(5), taken together and read in conjunction with the FCC regulation, create a scheme that provides regulatory oversight of interconnection agreements, either by a state commission or by the FCC in its place. Only one scenario, not present in this case, appears to be an exception to this scheme: when the parties reach a voluntarily negotiated agreement without any request for mediation or arbitration and the state commission fails to act to approve or reject the agreement. When these two circumstances occur, the resulting agreement will be deemed approved by the state commission, *see* sec. 252(e)(4); the FCC will not step in to assume the approval function. In all other cases, either a state commission or the FCC will exercise regulatory oversight over the interconnection agreement process.

Finally, subsection 252(e)(6), titled "Review of state commission actions," provides that whenever a state commission fails to act, the exclusive remedies for that failure to act will be proceedings by the FCC and any judicial review of the FCC's actions. It further provides that "[i]n any case in which a state commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section."

**B. The Litigation in the District Court**

MCI filed suit against the Illinois Commerce Commission and various individual Commissioners in their official capacities. It alleged that they had violated certain sections of the Act when conducting arbitration proceedings and approv-

ing the terms of MCI's interconnection agreement with Ameritech. In the *MCI* case, Ameritech filed a cross-claim against the Commissioners asserting a similar claim. Ameritech also filed its own action against the Commissioners challenging their approval of two negotiated agreements between Ameritech and other telecommunications carriers. MCI and Ameritech sought declaratory and other equitable relief.

The defendants moved to dismiss the plaintiffs' claims on Eleventh Amendment sovereign immunity grounds. The defendants argued that the Act could not abrogate the states' immunity. They also submitted that Illinois had not explicitly authorized waiver of its immunity through any statute or constitutional provision. The defendants further contended that their participation in the arbitration and review process under the Act did not constitute waiver of sovereign immunity because no provision of the Act required the state to submit to suit as a condition for exercising the authority granted it.

The plaintiffs argued that Congress had conditioned state commissions' participation in the arbitration and approval process on their submission to federal court jurisdiction. Thus, they argued, the defendants waived any Eleventh Amendment immunity when they elected to implement the federal regulatory scheme set forth in the Act with full knowledge that their determinations would be reviewable exclusively in federal court.

In reply, the defendants reemphasized that the Act contains no specific language expressly conditioning state commission participation in the regulatory process on consent to

suit in federal court. Rather, they contended, the Act provides only for federal court review of the agreements themselves.

**C. Holding of the District Court**

In denying the motions to dismiss, the district court determined that the defendants constructively had waived their Eleventh Amendment immunity and, in the alternative, that there was no Eleventh Amendment barrier because of the doctrine of *Ex parte Young*.

1.

The district court first determined that *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), had not invalidated the doctrine of implied waiver. In the court's view, although *Seminole Tribe* restricted Congress' ability to abrogate directly the states' sovereign immunity, the Court's decision left untouched the "unremarkable and completely unrelated" doctrine of waiver. R.59 at 11 (quoting *Seminole Tribe*, 517 U.S. at 63) (internal quotation marks omitted).

The district court then concluded that the defendants had participated voluntarily in the regulatory scheme established by the Telecommunications Act because the Act provided states with the option to arbitrate and to approve the interconnection agreements themselves or, instead, to let the FCC perform that function. Additionally, the district court noted, Congress had made it expressly clear in subsection 252(e)(6) that, if a state opts to participate in the regulatory scheme, its actions are reviewable in federal court. Thus, by participating--voluntarily--in the arbitration and approval process, the defendants had waived immunity from suit in federal court.

2.

In the alternative, the district court also held that the doctrine of *Ex parte Young* provides a basis for the defendants' lack of Eleventh Amendment immunity from this suit. The district court first noted that, contrary to the defendants' arguments, the relief sought by the plaintiffs was prospective in nature. The plaintiffs sought not money damages but declaratory and injunctive relief to redress ongoing violations of federal law.

The district court also rejected the defendants' argument that an *Ex parte Young* action is available only when the plaintiffs allege a constitutional (as opposed to statutory) violation. Relying on our decision in *Marie O. v. Edgar,* 131 F.3d 610 (7th Cir. 1997), the court held that an *Ex parte Young* action can be brought to vindicate violations of a federal statute.

The district court then concluded that the limitations placed on the *Ex parte Young* doctrine by *Seminole Tribe* and *Idaho v. Coeur d'Alene Tribe,* 117 S. Ct. 2028 (1997), did not affect the application of *Ex parte Young* to this case. *Seminole Tribe* limited, the district court acknowledged, the reach of *Ex parte Young* in cases in which Congress has created a detailed and comprehensive remedial scheme. But, held the district court, the Telecommunications Act at issue in this case did not create any such detailed scheme that would limit the type of remedies available to a district court. The district court further held that the narrow exception to *Ex parte Young* created in *Coeur d'Alene* also does not apply to this case. The district court explained that "the issues of sovereign immunity presented by review of state actions

taken pursuant to the Telecommunications Act are not nearly as compelling as those presented by the state of Idaho in the dispute over lands that it has historically considered a part of its territory." R.59 at 23.

Finally, the district court rejected the defendants' argument that Congress did not intend to make states parties to the federal suits reviewing interconnection agreements, but instead meant only to provide review of the *agreements* themselves. In rejecting this argument, the district court pointed out that the subsection providing for federal court review was titled "Review of state commission actions." R.59 at 25 (emphasis added).

## II

## DISCUSSION

### A. Basic Principles

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

In our decision in *Marie O. v. Edgar,* 131 F.3d 610 (7th Cir. 1997), we noted that, although the Eleventh Amendment generally has been interpreted to bar litigation in federal court by private entities against a state, three exceptions to this constitutional bar exist:

> First, suits against state officials seeking prospective equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment under the *Ex parte Young* doctrine. *See Ex parte Young,* 209 U.S. 123, 159-60 (1908). Second, individuals may sue a state directly if Congress has abrogated the state's immunity from suit through an unequivocal expression of its intent to do so and pursuant to a valid exercise of its power. *See Seminole Tribe of Florida v. Florida,* 517 U.S. [44, 55] (1996). Finally, individuals may avail themselves of suits against a state that has properly waived its sovereign immunity and consented to suit in federal court. *See id.* at [54-55]; *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 238 (1985).

131 F.3d at 615 (parallel citations omitted).

**B. Applicability of the Eleventh Amendment**

As a threshold matter, the defendants, relying on subsection 252(e)(6), submit that we need not concern ourselves with the application of the Eleventh Amendment because the Telecommunications Act does not even provide for suits against states in federal court, but instead provides only for federal court review of the interconnection agreements themselves. We cannot accept this suggestion; the provisions of the Act, read as a whole, will not permit such a construction and, indeed, make clear that Congress' intent was to the contrary. We believe that the language in subsection 252(e)(6)--"to determine whether the agreement or statement meets the requirements of section 251 and this section"--does not

speak to whether state commissions are to be parties or whether just the agreements may be reviewed, but rather speaks to the scope of the federal court's review. Because subsections 252(e)(3) and (f)(2) allow a state commission to consider state law when approving an agreement, we think it clear that subsection 252(e)(6) includes the "agreement" language quoted above to clarify that federal courts may review a state commission's actions with respect to an agreement only for compliance with the requirements of sec. 251 and sec. 252 of the Telecommunications Act, and not for compliance with state law. Moreover, we note that the subsection providing for judicial review is titled "Review of state commission actions," not "Review of interconnection agreements," thus signaling that Congress intended that the state commissions be parties to the federal court suits reviewing their actions, just as the FCC is a party to suits seeking review of its actions.

Subsection 252(e)(4), when read in conjunction with subsection 252(e)(6), provides additional evidence that Congress contemplated suits against state defendants in federal court. Subsection 252(e)(4) provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." This language indicates that Congress envisioned suits reviewing "actions" by state commissions, as opposed to suits reviewing only the agreements themselves, and that Congress intended that such suits be brought exclusively in the federal courts.

**C. Constructive Waiver**

The district court first relied upon the doctrine of waiver. We therefore turn to an examination of this basis for affirmance.

1.

The defendants first submit that the district court's reliance on constructive waiver was erroneous because *Seminole Tribe* invalidated the doctrine of constructive waiver. In the view of the defendants, *Seminole Tribe's* holding that Congress cannot use its Commerce Clause power to abrogate the states' sovereign immunity must also mean that Congress cannot accomplish the same result by forcing constructive waivers of immunity by the states. In support of their position, the defendants rely on two cases that expressed the view that *Seminole Tribe* invalidated the constructive waiver doctrine. *See Chavez v. Arte Publico Press,* 157 F.3d 282, 286-87 (5th Cir. 1998); *Close v. New York,* 125 F.3d 31, 40-41 (2d Cir. 1997).

The Supreme Court's decision in *Seminole Tribe* made clear that Congress has limited constitutional power to abrogate the protection afforded the states by the Eleventh Amendment against litigation in federal court. In *Marie O.,* however, we stated that *Seminole Tribe* left intact the "unremarkable, and completely unrelated [to abrogation], proposition that the States may waive their sovereign immunity." 131 F.3d at 617 (quoting *Seminole Tribe,* 517 U.S. at 65) (internal quotation marks omitted). Our approach is in conformity with the course taken by the majority of circuits in the wake of *Seminole Tribe. See, e.g., Genentech, Inc. v. Regents of Univ. of Cal.,* 143 F.3d 1446, 1453 (Fed. Cir. 1998), *petition for cert. filed,* 67 U.S.L.W. 3337 (U.S. Nov. 3, 1998)

(No. 98-731); *Mills v. Maine,* 118 F.3d 37, 50 (1st Cir. 1997); *Booth v. Maryland,* 112 F.3d 139, 145 (4th Cir. 1997), *cert. denied,* 118 S. Ct. 2063 (1998). In each of these cases, the courts proceeded as if the waiver doctrine survives *Seminole Tribe,* although they did not specifically decide the issue. The Ninth Circuit has considered this issue and decided explicitly that *Seminole Tribe* did not affect the doctrine of implied waiver. *See Premo v. Martin,* 119 F.3d 764, 770 n.2 (9th Cir. 1997), *cert. denied,* 118 S. Ct. 1163 (1998)[3]. Congress may condition a state's receipt of federal funds or participation in a federal program on the state's waiver of its immunity under the Eleventh Amendment, as long as Congress expresses its intent to do so using unmistakably clear language. *See Welch v. Texas Dep't of Highways & Public Transp.,* 483 U.S. 468, 477-78 (1987); *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 238 n.1 (1985).

As we noted in *Marie O,* any constructive waiver exacted by the federal government must be based on an "unequivocal indication" of the state's intent to consent to federal jurisdiction that would otherwise be barred by the Eleventh Amendment. Although the doctrine of constructive waiver was not extinguished by the Supreme Court's decision in *Seminole Tribe,* it is clear that "Congress must express, unambiguously, its intent to impose such a condition on the state." *Marie O.,* 131 F.3d at 617. "By insisting that Congress speak with a clear voice, we enable the States to exer-

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3 *See also* Kit Kinports, *Implied Waiver After* Seminole Tribe, 82 Minn. L. Rev. 793, 809-21 (1998) (arguing that the doctrine of implied waiver remains valid after *Seminole Tribe*).

cise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981).

There is, therefore, a fundamental difference between the sort of abrogation that the Supreme Court found constitutionally objectionable in *Seminole Tribe* and the concept of constructive waiver with which we deal in this case. That difference turns on the voluntariness of the state's choice in the waiver situation--a choice between waiving its immunity or forgoing participation in the federal statutory scheme at issue. When Congress gives states a genuine choice, clearly stated, as to whether or not to waive their sovereign immunity, the doctrine of constructive waiver survives *Seminole Tribe.* We turn now to an application of these principles to the case before us.

2.

The defendants next submit that, even if the doctrine of constructive waiver survives *Seminole Tribe,* there is no waiver of the State's sovereign immunity in this case. In their view, the Telecommunications Act contains no clear and unambiguous expression of Congress' intent to condition states' participation in the regulatory scheme on their consent to suit in federal court. They point out that the Act does not even mention sovereign immunity; nor does it indicate an intent to give states a choice between carrying out their responsibilities under the Act or retaining their sovereign immunity by letting the FCC fulfill their responsibilities. In their view, the absence of these elements from the statutory language negates any possibility of finding a constructive waiver; there is no textual manifestation that Congress

clearly intended to condition the states' participation under the Act on their waiver of sovereign immunity.

We cannot accept this argument. Although the language of the statute might not contain the express waiver language that the defendants seek, the structure of the pertinent section of the statute, notably 47 U.S.C. sec. 252, makes clear that Congress intended to provide for federal court review of any regulatory determinations made under the section, whether by a state commission or by the FCC acting in the place of a state commission. Section 252 first describes the duties of the carriers seeking to enter an interconnection agreement and then details the role of the state commissions in the mediation, arbitration and review process. It sets forth the standards by which the state commissions may impose terms upon the parties to the interconnection agreements during arbitration as well as the standards by which the state commission must approve or reject an agreement. Subsection 252(e)(5) then provides that, if a state commission fails to carry out its responsibilities under sec. 252, the FCC will act in place of the state commission. Subsection 252(e)(6), titled "Review of state commission actions," then provides that the exclusive remedy for a state commission's failure to act will be the proceedings before the FCC and any judicial review of the FCC's actions. It further provides that any party aggrieved by a state commission's determination under sec. 252 may obtain review "in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and [section 252]." 47 U.S.C. sec. 252(e)(6).

This statutory structure gives each state the option to involve itself in the regulatory scheme or to let the FCC act in

its place. Under the terms of sec. 252, *some* administrative body will exercise regulatory authority over interconnection agreements, and that administrative action, whether taken by a state administrative tribunal or the FCC, is subject to review in federal court. If the reviewing body is a state commission, its actions are reviewable in federal court under 47 U.S.C. sec. 252(e)(6); if the reviewing body is the FCC, its actions are reviewable in federal court under 28 U.S.C. sec. 2342. In short, under the Telecommunications Act, Congress gave states a genuine choice: The states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court; or the states could retain their sovereign immunity and allow the FCC to carry out the federal regulatory functions without their participation. *See* 47 U.S.C. sec. 252(e)(5)-(6). Because this scheme results in a suit against a state entity in federal court only if the state chooses to participate, the statute involves a constructive waiver--not an abrogation--of the Eleventh Amendment and therefore does not run afoul of *Seminole Tribe.*

We are cognizant of the argument that subsections 252(e)(4) and (e)(5) give rise to a possible scenario in which a state's choice to opt out might arguably be less than voluntary. If parties reach an interconnection agreement through private negotiations (without asking a state commission to mediate or arbitrate) *and* the state commission fails to take action to approve or reject the agreement, the Act provides that such an agreement will be "deemed approved." 47 U.S.C. sec. 252(e)(4). When an agreement is "deemed approved" under sec. 252(e)(4), the FCC does not step in to act in place of the state commission. *See* 47 C.F.R. sec. 51.801.

Therefore, in this situation, a state commission arguably must choose between reviewing the agreement (thereby subjecting itself to federal court jurisdiction) or accepting the result that the agreement will go into effect without any regulatory oversight. *See Wisconsin Bell, Inc. v. Public Serv. Comm'n,* 27 F. Supp. 2d 1149, 1158, (W.D. Wis. 1998). Although the voluntariness of a state's choice to opt out of the process is less clear in such a situation, we do not have this problem before us today. Such agreements are at issue in 98-2256, but we have granted Ameritech's motion to dismiss that appeal and to remand that case to the district court for a voluntary dismissal with prejudice. We therefore need not decide--and reserve for another day--whether having a negotiated agreement go into effect without government oversight is the kind of consequence that leaves a state no true choice but to involve itself in the review process. As this case now comes to us, the defendants affirmatively and voluntarily exercised the choice to involve themselves in the arbitration and approval process while fully aware that the Act provides for federal court review of their actions. Given that the plaintiff carriers had requested arbitration, the FCC would have stepped in had Illinois decided to opt out. *See* sec. 252(e)(5). Therefore, Illinois did not face a choice between submitting to review in federal court or letting the agreements be implemented without government oversight. Thus, without deciding whether a state waives its sovereign immunity by reviewing a privately negotiated agreement, we hold today that, on the record before us, the defendants effectively waived their sovereign immunity by choosing to carry out the arbitration and approval functions as provided in sec. 252 of the Telecommunications Act.

In sum, the Act provides state commissions with a realistic and genuine choice whether to involve themselves in the regulatory process when asked to arbitrate and approve interconnection agreements, or whether to let the FCC assume those functions. In this case, the defendants exercised that choice voluntarily by opting to participate in the regulatory scheme and thereby consented to suit in federal court.

**Conclusion**

We hold that, by electing to assume responsibility for the arbitration contemplated by the Act, the defendants waived the State's immunity from suit in federal court provided by the Eleventh Amendment. Although the wording of the statute does not mention explicitly waiver of sovereign immunity, the structure of the statute, and therefore its operation, make clear that a state's decision to exercise regulatory authority, which would otherwise remain under exclusively federal control, triggers waiver of its sovereign immunity from suit in federal court.4 Accordingly, the judgment of the district court in 98-2127 is affirmed.

AFFIRMED

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4 Because we have decided that the state authorities waived their Eleventh Amendment immunity, we need not address whether the doctrine of *Ex parte Young* affords an alternate basis for holding that the Eleventh Amendment does not bar this action.

**APPENDIX C – MEMORANDUM OPINION AND ORDER IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED MARCH 30, 1998**

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 97 C 2225

MCI TELECOMUNICATIONS CORPORATION, *et al.*,

Plaintiffs,

v.

ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS, INC. *et al.*,

Defendants.

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No. 97 C 4096

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,

Plaintiffs,

v.

CENTRAL TELEPHONE COMPANY OF ILLINOIS, *et al.*,

Defendants.

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No. 97 C 0886

AT&T COMMUNICATIONS OF ILLINOIS, INC.,

Planitiff,

v.

ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS, *et al.*,

Defendants.

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No. 97 C 8285

ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS,

Plaintiff,

v.

DAN MILLER, *et al.*,

Defendants.

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JUDGE DAVID H. COAR

**MEMORANDUM OPINION AND ORDER**

Pursuant to an order of this court, the above-captioned cases have been determined to be "related." All four of these cases are brought under Section 252 of the Telecommunica-

tions Act of 1996, challenging decisions of the Illinois Commerce Commission in approving interconnection agreements under the Act. Currently pending in three of the cases1 are motions to dismiss filed by defendants, the Illinois Commerce Commission's ("ICC") and the Commissioners of the ICC's ("the Commissioners"), (referred to herein collectively as "the defendants"), pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(2). The defendants argue in their motions that Eleventh Amendment sovereign immunity protects them from suit in these cases.

This memorandum opinion and order also addresses the defendants ICC's and Commissioners' motion to dismiss the counterclaim of defendant Illinois Bell Telephone Company d/b/a Ameritech Illinois filed in *MCI v. Illinois Bell Telephone,* Case No. 97 C 2225. As in their other motions to dismiss discussed in this opinion, ICC and the Commissioners argue that they cannot be made to defend because of Eleventh Amendment immunity.

In *MCI v. Central Telephone,* Case No 97 C 4096, there are no motions filed on this issue. However, on July 21, 1997, this court has granted a stay of the action pending resolution of the ICC's and Commissioners' motions to dismiss filed in *MCI v. Illinois Bell,* Case No. 97 C 2225. In lieu of filing memoranda, the parties agreed to be bound by this court's ruling on the Eleventh Amendment issue.

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1 *MCI v. Illinois Bell,* Case No. 97 C 2225, *AT&T v. Illinois Bell Telephone,* Case No. 97 C 08886, and *Illinois Bell Telephone Company v. Miller,* Case No. 97 C 8284.

For the reasons stated in this memorandum opinion and order, the ICC's and the Commissioners' motions are DENIED.

## I. BACKGROUND

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of Title 47 of the United States Code) (hereinafter "the Act" or Telecommunications Act") was enacted "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications customers and encourage the rapid deployment of new telecommunications technologies." Act, *Statement of Purpose.* The Act, which amends the Telecommunications Act of 1934, preempts state and local barriers to market entry and requires new entrants into local telecommunication markets to be provided with access to telephone networks and services on "rates, terms, and conditions that are just, reasonable, and non-discriminatory." 47 U.S.C. § 251 (c)(2)(D)(1998). Under Sections 251 and 252 of the Act, incumbent local exchange carriers and telecommunication carriers have the duty to negotiate in good faith the terms and conditions of agreements regarding facilities access, interconnection, resale of services, and other arrangements contemplated by the Act. *See* 47 U.S.C. §§ 251(c), 252 (1998).

Section 252 provides that parties may enter into agreements either voluntarily or through arbitration with a state public utility commission. If, however, the state declines to accept the regulatory role detailed in the statute, such duties are assumed by the Federal Communications Commission:

> If a state commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

47 U.S.C. § 252(e)(5) (1998). If the parties are unable to reach an agreement voluntarily, either party may petition the state public utility commission (or the FCC) for arbitration. See 47 U.S.C. § 252(b)(1) (1998). A final interconnection agreement, whether negotiated or arbitrated, is required to be reviewed by the state commission (or FCC) in order to determine whether it complies with the Act. Specifically, Section 252(e)(1) provides that:

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

The Act further provides that any party that is "aggrieved" has the right to bring an action in federal court to challenge the terms of the interconnection agreement:

> In a case in which the State fails to act as described in paragraph (5), the proceeding by the Commis-

> sion under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 250, of this title and this section.

47 U.S.C. § 252(e)(6) (1998). In the cases currently under review, the plaintiffs have filed suit under Section 252(e)(6) to seek redress for various provisions of interconnection agreements that were reviewed, arbitrated, and/or approved by the ICC. In *MCI v. Illinois Bell Telephone,* Case No. 97 C 2225, and *AT&T v. Illinois Bell Telephone,* Case No 97 C 0886, the United States of America and the Federal Trade Commission have filed motions to intervene. Those motions have been granted.

## II. STANDARDS

The defendants ICC and the Commissioners move to dismiss the plaintiffs' complaints (and a co-defendants counterclaim) under Federal Rules of Evidence 12(b)(1) and 12(b)(2), claiming immunity under the Eleventh Amendment of the United States Constitution. The plaintiffs, co-defendants, and intervenors United States and the Federal Communications Commission ("FCC") have filed motions to in opposition to the ICC's and the Commissioners' motions to dismiss.

A. RULE 12(b)(1)

A motion to dismiss for lack of diversity jurisdiction under Fed.R.Civ.P. 12(b)(1) can be raised at any time. *Alexander v. Allister Const. Co.*, 424 F.Supp.277, 278 (N.D. Ill.1976). When presented with a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, the district court must normally accept the complaint's well-pleaded factual allegations as true and draw reasonable inferences in favor of the plaintiff. *United Transp. Union v. Gateway Western Ry. Co.*, 78 F.3d 1208, 1210 (7th Cir. 1996) (citing *Rueth v. U.S. E.P.A.*, 13 F.3d 227, 229 (7th Cir. 1993)). Once the jurisdictional allegations have been controverted, it is the plaintiff's burden to come forward with additional evidence to support a claim of jurisdiction. *Seglin v. Esau*, 769 F.2d 1274, 1277 (7th Cir. 1985) (citing *Pratt Central Park Ltd. Partnership v. Dames & Moore, Inc.*, 60 F.3d 350 (7th Cir. 1995)).

B. RULE 12b)(2)

Federal Rule of Civil Procedure 12(b)(2) provides that an action should be dismissed if, upon a motion, the court finds that it lacks jurisdiction over the person. Fed.R.Civ.P. 12(b)(2). In order to raise lack of in personam jurisdiction as a defense, the party raising the defense must do so before a responsive pleading is served, or the defense is waived. *EF Operating Corp. v. American Bldgs.*, 993 F.2d 1046 (3d Cir.), *cert. denied*, 510 U.S. 868, 114 S. Ct. 193 (1993); 5A Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1351 (1990). Uncontroverted factual allegations are accepted as true for the purposes of such a motion. *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583 (Fed.

Cir. 1993), *cert. denied,* 512 U.S. 1235, 114 S. Ct. 2738 (1994). Where the court's jurisdiction has been controverted, "the party invoking jurisdiction has the burden of supporting the allegations of jurisdictional facts by competent proof." *Grafon Corp. v. Hausermann,* 602 F.2d 781, 783 (7th Cir. 1979) (citation omitted).

C. ELEVENTY AMENDMENT IMMUNITY

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suite in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend XI. "The principle of sovereign immunity has been deeply embedded in our federal system since its inception, and is required because of the sensitive problems inherent in making one sovereign appear against its will in the courts of another." *Welch v. Texas Dept. of Highways and Public Transp.,* 483 U.S. 468, 469, 107 S. Ct. 2941, 2943 (1987). The Eleventh Amendment bar is jurisdictional: "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 98, 104 S. Ct. 900, 906 (1984).

In general, the Eleventh Amendment has been interpreted to ban suits in federal court against unconsenting states. *See Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 54, 116 S. Ct. 1114, 1122 (1996); *Pennhurst,* 465 U.S. at 100, 104 S. Ct. at 908. Although on its face the Eleventh Amendment

only prohibits actions brought by out-of-state citizens, a state's protection from suit under the Eleventh Amendment has been interpreted to extend to suits brought in federal court by the state's own citizens. *See e.g., Hans v. Louisiana,* 134 U.S. 1, 10 S. Ct. 504 (1890); *Employees of Dept. of Public Health and Welfare v. Depart. of Public Health and Welfare,* 411 U.S. 279, 93 S. Ct. 1614 (1973). Eleventh Amendment immunity also protects agencies that are arms of the state government. *Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Ass'n,* 450 U.S. 147, 149-50, 101 S. Ct. 1032, 1034 (1981). Nonetheless, Eleventh Amendment immunity is not absolute. Courts have recognized several exceptions to the principle of sovereign immunity.

## III. DISCUSSION

ICC and the Commissioners argue in their motions to dismiss that the claims against them are barred by the Eleventh Amendment to the United States Constitution. The various motions filed in opposition to the ICC and the Commissioner's motions to dismiss argue that the facts of the present case fall within recognized exceptions to Eleventh Amendment immunity. In particular, they argue that (1) the ICC and Commissioners have waived their Eleventh Amendment immunity; and, (2) under the doctrine of *Ex parte Young,* 209 U.S. 123, 159-60, 28 S. Ct. 441, 453-54 (1908), the Commissioners cannot claim immunity in a suit claiming prospective relief. This court will examine each argument in turn.

### A. WAIVER

By waiving the protections of the Eleventh Amendment, a state or state agency may consent to suit in federal court. *Kroll v. Board of Trustees,* 934 F.2d 904, 907 (7th Cir.), *cert. denied,* 502 U.S. 941, 112 S. Ct. 377 (1991); *Darne v. State of Wisconsin, Department of Revenue,* __ F.3d __, __, 1998 WL 69367, at *2 (7th Cir. Feb. 23, 1998). The Supreme Court has recently reaffirmed that the theory of constructive waiver is a viable doctrine: "a state can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it." *Idaho v. Coeur d'Alene Tribe of Idaho,* __ U.S.__, 117 S. Ct. 2028, 2033 (1997) (Kennedy, J.). *See also Seminole Tribe,* 517 U.S. at __, 116 S. Ct. at 1128 (leaving intact the "unremarkable . . . proposition that the States may waive their sovereign immunity.") A state may effectuate such a waiver "by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular program." *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 238 n. 1, 105 S. Ct. 3142 at 3145, n. 1 (1985). If a state is found to have waived its immunity, the state may be sued in federal court "even for retroactive relief to be paid out of the state treasury." Erwin Chemerinsky, *Federal Jurisdiction* § 7.6 at 406 (2d ed. 1994) (hereinafter "Chemerinsky").

However, the test for determining whether waiver exists is stringent. *Atascadero,* 473 U.S. at 241, 105 S. Ct. at 3146. Waiver by a state will be found "only where stated by the most express language or 'by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' " *Edelman v. Jordan,* 415 U.S. 651, 673, 94 S. Ct. 1347, 1361 (1974) (quoting *Murray v. Wilson Distilling Co.,* 213 U.S. 151, 171, 29 S. Ct. 458, 464 (1909)).

*See also Pennhurst,* 451 U.S. at 17, 101 S. Ct. at 1539-40 (1981) ("By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.").

1. Explicit Versus Constructive Waiver

A state's waiver of the Eleventh Amendment may be either explicit or constructive. In order to be explicit, the state must "expressly agree to be sued in federal court." Chemerinsky, §7.6 at 406. Explicit waivers are generally found in state statutes or constitutional provisions that specifically permit suit in federal court. In the cases presently before the court, however, the various parties do not contend that the state has explicitly waived its immunity. Instead, the parties proceed under a theory of constructive waiver.

Constructive waiver is generally found when a state participates in a federal program that conditions funding or participation on consent to jurisdiction. *See Digiore v. State of Illinois,* 962 F. Supp. 1064, 1074 (N.D. Ill. 1997) (finding that "(c)onsent through quid pro quo participation in federal programs amounts to a 'constructive waiver' of immunity") (citation omitted). Constructive waiver is generally disfavored by the courts. *Edelman,* 415 U.S. at 673, 94 S. Ct. at 1360 ("Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights.") As a result, constructive waiver is rarely found:

> [C]onstructive waiver of Eleventh Amendment immunity is virtually nonexistent. If it ever will exist, it will be in situations where Congress indicates a clear intent to make states liable in federal court

> if they engage in a particular activity, and then a state voluntarily chooses to engage in that conduct. The congressional desire to make states liable must be in unmistakable language in the statute itself and it must be an area where the state realistically could choose not to engage in the activity.

Chemerinsky, §7.6 at 410 (internal quotation marks and footnotes omitted). Thus, although states can waive their immunity by opting to participate in a federal program, Congress must clearly condition such participation on waiver. *Edelman,* 415 U.S. at 673-74, 94 S. Ct. at 1361; *Port Authority Trans-Hudson Corp. v. Feeney,* 495 U.S. 299, 110 S. Ct. 1868 (1990); *Atascadero,* 473 U.S. at 247, 105 S. Ct. at 3149; *Marie O. v. Edgar,* 131 F.3d 610, 617 (7th Cir. 1997). Furthermore, such participation must be voluntary and it must be expressly clear that such participation will require appearance in federal court. *See Edelman,* 415 U.S. at 673, 94 S. Ct. at 1361 ("The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts."); *Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n,* 450 U.S. 147, 150, 101 S. Ct. 1032, 1034-45 (1981) (the fact that a state agrees to comply with federal law in conjunction with a federal program is insufficient to waive Eleventh Amendment immunity); *Digiore,* 962 F. Supp. at 1074 (finding that the state cannot be found to have constructively waived immunity by participation in FLSA, in part, because "FLSA is not a voluntary spending program whose benefits the states may decide to accept or reject").

2. Did *Seminole Tribe* Invalidate the Doctrine of Constructive Waiver?

In their motions to dismiss the ICC and Commissioners argue that the Supreme Court's decision in *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S. Ct. 1114 (1996), rejected the theory of constructive waiver. For example, in their motion to dismiss the counterclaim agianst them filed in *MCI v. Illinois Bell,* Case No. 97 C 2225, the defendants contend that the doctrine of constructive waiver is inconsistent with *Seminole Tribe.* Mem. at 2. The defendants further claim that "waiver of immunity can only be made in the state's constitution, statutes, or decisions." Mem. at 1.

The defendants' arguments are unpersuasive. First of all, as previously stated, waiver of immunity premised on a state's constitution, statute or decision is generally what is known as explicit waiver. *See Supra,* Part III.A.1. Constructive waiver, however, may be based on factors beyond the state's own constitution or laws. *Id.*

Second, the defendants misread the Court's decision in *Seminole Tribe.* Rather than reject the principle of waiver, as the defendants contend, the Court in *Seminole Tribe* explicitly reaffirmed the "proposition that the States may waive their sovereign immunity." 517 U.S. at 63, 116 S. Ct. at 1128. The *Seminole Tribe* decision, however, did not focus on the concept of waiver at all. Rather, that opinion addressed the proper standard to determine whether Congress can and has abrogated the States' sovereign immunity. *Id.,* 517 U.S. at 55, 116 S. Ct. at 1123. Congress' ability to abrogate sovereign immunity is, as the Supreme Court explained, is "unremarkable and completely unrelated" to the doctrine

of waiver. *Id.*, 517 U.S. at 63, 116 S. Ct. at 1128. As the Supreme Court clarified even more recently in *Coeur d'Alene Tribe,* the Eleventh Amendment "enacts a sovereign immunity from suit, rather that a nonwaivable limit on the federal judiciary's subject-matter jurisdiction." __ U.S. at __, 117 S. Ct. at 2033.

Among other cases, the defendants cite a recent district court decision from the Northern District of Illinois, *Digiore v. State of Illinois,* 962 F. Supp. 1064 (N. D. Ill. 1997) (Castillo, J.) in support of their argument that jurisdiction based on constructive waiver may not be found after *Seminole Tribe.* In *Digiore,* the court found that the Eleventh Amendment protected the state of Illinois from suit by a group of Illinois police officers for violations of overtime and pay in violation in the Fair Labor Standards Act. *Id.* at 1074. Although the defendants are correct that *Digiore* acknowledged the "tight restrictions" placed on "congressional power to eradicate immunity" by *Seminole Tribe,* they forget to mention that the court in *Digiiore* specifically acknowledged the "narrow exception" of constructive waiver, *Id.* at 1076, which applies "where the state, with full knowledge that it faces federal court liability, nonetheless chooses to engage in the activity regulated by the federal program, " *Id.* at 1074 (citing *Atascadero,* 473 U.S. at 247, 105 S. Ct. at 2149-50; *Parden v. Terminal Ry. of Alabama State Docks Dept.,* 377 U.S. 184, 191, 84 S. Ct. 1207, 1212 (1964)).

Just last month, in a decision applying the Supreme Court's decision in *Seminole Tribe* to the concept of Eleventh Amendment sovereign immunity, the Seventh Circuit affirmed that there are three different exceptions to state immunity:

> First, suits against state officials seeking prospective equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment. Second, individuals may sue directly a state when Congress has abrogated the immunity in unequivocal terms and pursuant to a valid exercise of its own power. Finally, a suit may be brought against a state directly when a state has waived its immunity and validly consented to suit in federal court.

*Darne v. State of Wisconsin Department of Revenue.* __ F.3d __, 1998 WL 69367, at *2 (7th Cir. Feb.23, 1998) (citing *Marie O.*, 131 F.3d at 615). Thus, the limitations that *Seminole Tribe* placed on the ability of Congress to abrogate a state's sovereign immunity is entirely independent from the well-established exception to Eleventh Amendment immunity know as waiver. *See also Moores Federal Practice 3d* §§ 123.22 - 123.21 (1997) (discussing in separate sections (1) the power of Congress to abrogate the states' Eleventh Amendment immunity in certain circumstances and (2) the fact that a state may explicitly or constructively waive its Eleventh Amendment sovereign immunity); Kit Kinsports, *Implied Waiver After Seminole Tribe,* 82 Minn. L. Rev. 793, 807 (1998) (arguing that the doctrines of implied waiver and abrogation are two distinct concepts). The defendants' arguments that the doctrine of constructive waiver does not exist is unsupported and misconstrues the current state of the law.

3. Conclusion

A careful analysis of the cases presently before the court reveals that the state's actions in these cases constitute a con-

structive waiver, and thus falls within this narrow exception to immunity. The ICC and the Commissioners voluntarily agreed to arbitrate the agreements in question. Instead of allowing the agreements to be arbitrated by the FCC pursuant to Section 252(e)(5) of the Act, the state *voluntarily* participated in the regulatory scheme:

> If a State commission fails to act to carry out its responsibility under this section in any proceeding of other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding . . . and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

47 U.S.C. § 252(e)(5) (1998). Furthermore, Congress made it expressly clear that participation in the regulatory scheme requires review in federal court:

> [A]ny judicial review of the Commission's actions shall be the exclusive remedies for a State commissioner's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court . . .

47 U.S.C. § 252(e)(6) (1998). The interconnection agreements in question are exclusively reviewable in federal court under Section 252(e)(6). *See Iowa Utilities Bd. v. F.C.C.*, 120 F.3d 753, 803 (8th Cir. 1997), *cert granted, AT & T Corp. v. Iowa Utilities Bd.*, __ U.S. __, 118 S. Ct. 879 (Jan.

26, 1998) ("We afford subsection 252(e)(6) our traditional presumption and conclude that it is the *exclusive* means to attain review of state commission determination under the Act.") (emphasis added).

There can be no other reasonable interpretation of state's actions in this case: By participating voluntarily in the regulatory scheme, they have consented to suit in this court. The state participated in the arbitration process with full knowledge that Section 252(e)(6) provides for federal review of agency action and, pursuant to Section 252(e)(4), no state court may review such determinations. The state was also aware that if they had decided to not carry out the functions detailed in Section 252, the federal government would have performed the role. The language of the Act is clear and open to no other interpretation. Had the state declined to participate in the non-obligatory federal program, it would have preserved its sovereign immunity.2

A district court in the Western District of Washington recently decided a similar case involving whether the state and waived its Eleventh Amendment immunity in case brought pursuant to the Telecommunications Act of 1996:

> The "overwhelming implication" of this statutory structure is that Congress conditioned state partici-

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2 The defendants do not directly argue in the briefs that their participation in the regulatory scheme was somehow involuntary or that they never "consented" to the application of the Act or its mandatory federal review scheme. Defendants also do not contend that the act(s) of arbitrating was performed independently of the regime set forth in Section 252.

> pation in the interconnection agreement negotiation, arbitration and approval process on consent to federal judicial review of the state's participatory actions. A state is permitted -- but not required -- to act as the principal regulatory body in the process. But the statute makes clear that if a state accepts Congress's invitation, its actions will be reviewable in federal court. There is "no room for any other reasonable construction" of the statute. By participating in the arbitration and approval process, [the state] consented to review of its actions.

*U.S. West Communications, Inc. v. TCG Seattle*, 971 F. Supp. 1365, 1369 (W.D. Wash. 1997). Other courts that have examined this issue to date are in agreement that voluntary participation by the state in the federal telecommunications scheme outlined in Section 252 constitutes a waiver of Eleventh Amendment immunity. *See e.g., U.S. West Communications, Inc. v. Thoms*, No. 4-97-CV-70082, slip op. at 5 (S.D. Iowa Aug. 4, 1997) (hereinafter "*Thoms*") ("By choosing to participate in the arbitration and approval scheme notwithstanding the express provision for exclusive federal jurisdiction, Iowa waived any claim of Eleventh Amendment immunity."); *U.S. West Communications, Inc. v. Reinbold*, No. A1-97-25, slip op. at 8 (D.N.D. July 28, 1997) (hereinafter "*Reinbold*") ("Upon deciding to regulate under the Act, the State agency consents to review of its actions in federal court."); *Bell South Telecommunications, Inc. v. Tennessee Regulatory Authority, et al.*, No. 3:97-0523, slip op. at 12 (M.D. Tenn. Jan. 29, 1998) (hereinafter "*Tennessee Regulatory*") ("[S]tates cannot be allowed to circumvent federal law which calls for a waiver of immunity by invoking state law

barriers."); *AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc. et al.*, No. 5:97-CV-405-BR, slip op. At 10-11 (E.D. N.C. Nov. 20, 1997) (hereinafter "*AT&T v. BellSouth*") (finding that the state, "by its voluntary involvement in the consummation of the interconnection agreements, waived its Eleventh Amendment immunity").

This court hereby finds that the clear intention of Congress was to require review by federal courts of any arbitration or approval of interconnection agreements made pursuant to the Act. By deciding to participate in the arbitration and approval processes, the ICC and the Commissioners have subjected themselves voluntarily to suit in federal court. Accordingly, their motion to dismiss the complaint due to Eleventh Amendment immunity is denied.

B. *EX PARTE YOUNG*

Although this court has found that the doctrine of waiver prohibits ICC and the Commissioners from defending these suits on the basis of Eleventh Amendment immunity, there is an alternate basis for finding that the Commissioners are not protected by the Eleventh Amendment in this instance: the doctrine of *Ex parte Young. See Ex Parte Young,* 209 U.S.123, 28 S. Ct. 441 (1908). In the *Young* decision, the Supreme Court found that federal courts have jurisdiction over a suit against a state officer for injunctive relief of ongoing violations of federal law, even if the state is protected by Eleventh Amendment immunity. *See id.* "[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States."

*Pennhurst,* 465 U.S. at 105, 104 S. Ct. at 910 (internal citations omitted).

1. Type of Relief Sought

The defendants argue that the *Ex parte Young* doctrine does not apply in the cases currently under review because the type of relief sought by the plaintiffs is retrospective. "[O]fficial-capacity suits for retrospective relief -- i.e., money damages payable from the state treasury -- generally implicate the Eleventh Amendment in the absence of a waiver by the state or a valid congressional override." *Kroll,* 934 F.2d at 907-08 (citing *Quern v. Jordan,* 440 U.S. 332, 99 S. Ct. 1139 (1979)). *See also Edelman,* 415 U.S. at 668, 94 S. Ct. at 1358; *Green v. Mansour,* 474 US.S. 64, 68-69, 106 S. Ct. 423, 425-426 (1985).

However, officials may only be sued in their official capacities for injunctions contemplating prospective relief. *MSA Realty Corp. v. State of Illinois,* 990 F.2d 288, 291 (7th Cir. 1993); *Edelman,* 415 U.S. at 662-665, 94 S. Ct. at 1355-56. *See also Kroll,* 934 F.2d at 908 (finding that the Eleventh Amendment does not bar suits against state officials in their official-capacity if the suit is for prospective relief); *Darne,* 1998 WL 69367 at *2 ("[S]uits against state officials seeking prospective equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment.") Prospective relief includes relief such as "an injunction or a declaratory judgment and monetary damages that are 'ancillary' to either." *Kroll,* 934 F.2d at 908. *See also Coeur d'Alene Tribe,* __ U.S. at __, 117 S. Ct. at 2043 (O'Connor, J., concurring in part) ("Where a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a

claim can ordinarily proceed in federal court.") (internal citations omitted).

Accordingly to ICC and the Commissioners, the plaintiffs' request that the court review the agreements and determine whether the ICC violated federal law is not prospective: "[F]or a court to determine whether the agreement meets the requirements of the Act . . . [and] to reform the agreement to comply with federal law on an ongoing basis, would necessarily involve looking to past, completed conduct by the Commission." Reply Mem. at 18 filed in *MCI v. Illinois Bell*, Case No. 97 C 2225. According to the defendants such an action is retrospective because the "arbitration and approval process is over." *Id.* at 19.

Contrary to the defendants' assertions, the relief that the plaintiffs seek in the cases currently under review is prospective. The plaintiffs request judicial review of whether the ICC's determinations comport with the requirements of the Act and injunctive relief to redress any ongoing violations of federal law. To the extent that the state is continuing to engage in arbitration and review of interconnection agreements, their alleged violations of the Act are ongoing. Furthermore, none of the plaintiffs seek money damages, which would clearly be barred under the doctrine of *Ex parte Young*. Carried to its logical end, the defendants' argument would allow the state to continue to violate federal law while denying the plaintiffs any recourse in federal court because the review would include scrutiny of past acts. *See Thoms*, slip op. at 4 (rejecting the state's argument that a complaint filed pursuant to Section 252 of the Telecommunications Act seeks retrospective review of the state's actions). Accordingly, this court finds that the relief requested by the plain-

tiffs -- in injunction or declaration requiring the Commissioners to follow the Act in making their regulatory decisions -- is undeniably prospective and within the meaning of the *Ex parte Young* exception.

Must the Complaints Include an Allegation that the Commissioners violated the Constitution?

The defendants next argue that the plaintiffs suit must fail in those cases where the plaintiffs do not allege a violation of the Constitution: "*Ex parte Young* is concerned with violations of the Constitution, not with alleged misapplication of federal law" Reply Mem. at 12, *Illinois Bell v. Miller,* Case No. 97 C 8285. *See also* Reply Mem. at 10-17, *MCI v. Illinois Bell,* Case No. 97 C 2225. While it may be true that alleging a constitutional violation will weigh against state sovereignty and in favor of review of the particular case in federal court, alleging a constitutional violation is not a requirement to proceeding under the doctrine of *Ex parte Young. See Coeur d'Alene,* 117 S. Ct. at 2039 (Kennedy, J., with Rehnquist, C.J.) (stating that a violation of the Constitution offers "a powerful reason to provide a federal forum").

The Supreme Court has repeatedly emphasized that the *Young* doctrine is premised on the concept of "the need to promote the vindication of federal rights." *Pennhurst,* 465 U.S. at 105, 104 S. Ct. at 910 (citation omitted). Thus, although claims brought under the *Young* rule may involved constitutional issues, a constitutional claim is not required in order to proceed. For example, in a recent case decided by the Seventh Circuit, *Marie O. v. Jim,* 131 F.3d 610, 617 (7th Cir. 1997), an action brought to vindicate rights under a federal law was found to fall squarely within the doctrine of *Ex*

*parte Young.* In *Marie O.*, a group of infants with disabilities filed a class action suit against the State of Illinois alleging that the state was not complying with the Individuals with Disabilities Education Act ("IDEA"). *Id.* at 611. The Seventh Circuit upheld the claim under the *Young* rule, finding that a suit against the state "seeking to enforce compliance with the federal program under which they have accepted funds is cognizable under the *Ex parte Young* doctrine." *Id.* at 617.

This court rejects any argument that the plaintiffs must include a constitutional claim in their complaints in order to proceed under *Ex parte Young.*

3. Effect of *Seminole Tribe* on the *Young* Doctrine

The Supreme Court has recently written two major opinions addressing the subject of Eleventh Amendment Sovereign immunity, *Seminole Tribe* and *Coeur d'Alene.* As both of these decisions have impacted the scope of the *Ex parte Young* doctrine it is necessary to address them here.3

In *Seminole Tribe*, 517 U.S. 44, 116 S. Ct. 1114, the Seminole Tribe of Indians sued the Governor and the state of Florida, alleging a violation of the Indian Gaming Regulatory Act ("IGRA"). The IGRA statute required states to negotiate in "good faith" with Indian tribes for formation of a compact regulating gambling activities. If the state failed to negotiate in good faith as required by the Act, sanctions followed. In applying the *Young* doctrine to the remedial scheme outlined in the IGRA, the Court explained that the

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3 *Coeur d'Alene* will be discussed in the following subsection, *see infra* Part III.B.4.

fact that the Act included a specific and "modest set of sanctions" weighed against application of the *Ex parte Young* doctrine *Id.* at 75, 116 S. Ct. at 1133. In such a case, "an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court" rather than the modest sanctions outlined in the IGRA. *Id.*

Writing for the court, Chief Justice Rehnquist limited the reach of the *Ex parte Young* doctrine by finding that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting action against a state officer based upon *Ex parte Young*." *Id.* at 74, 116 S. Ct. at 1132. The Court emphasized, however, that their ruling does not prohibit Congress from authorizing "federal jurisdiction under *Ex parte Young* over a cause of action with a limited remedial scheme." *Id.* at 75, n. 17, 116 S. Ct. at 1133, n. 17.

The instant case, however, is significantly different from *Seminole Tribe*. In contrast to the IGRA, the Telecommunications Act does not incorporate a "detailed remedial scheme" that would limit the type of remedies that a district court could prescribe in such a case. In fact, the only direction that the Act gives the court is that the court shall "determine whether the agreement or statement meets the requirements of section 251." 42 U.S.C. § 252(e)(6) (1998). Several courts that have already examined the effect of *Seminole Tribe* on actions brought against state officers under the Telecommunications Act have found that such an action may proceed despite the tightening of the *Young* doctrine presented in *Seminole Tribe*. *See, e.g., Thoms*, slip

op. at 4; *AT&T v. BellSouth,* slip op at 12. In addition, the remedial scheme contemplated in *Seminole Tribe* is different from the one currently under review because the IGRA *required* the state to take action, whereas the Telecommunications Act is an *optional* remedial scheme that allows states to decide whether to participate in it. As one court recently found:

> This kind of provision [in Section 252 of the Telecommunications Act] is distinct from the one at issue in the IGRA [in *Seminole Tribe*] which required the state itself to be a party to a compact with an Indian tribe, and to submit to arbitration if it failed to comply. The 1996 Act does not force the State to act affirmatively, nor does it punish the State for refusing to do so. Quite the contrary, the Act gives States the *option* of arbitrating interconnection agreements, but also gives the parties to such an agreement an alternative forum for arbitration if the State chooses not to become involved.

*BellSouth,* slip op. at 15 (emphasis in the original). This court therefore concludes that the Supreme Court's decision in *Seminole Tribe* does not preclude application of the *Ex parte Young* doctrine in the present case.

4. *Idaho v. Coeur d'Alene Tribe* and the *Young* doctrine

A second recent Supreme Court case, *Idaho v. Coeur d'Alene Tribe of Idaho,* __ U.S. __, 117 S. Ct. 2028 (1997), again reaffirmed the *Ex parte Young* doctrine: "The Court does not question the continuing validity of the *Young* doctrine." *Id.* at __, 117 S. Ct. at 2030. Nonetheless, the opinion

did carve out a new exception to *Young* which is necessary to address here. In *Coeur d'Alene Tribe* the Court rejected the application of the *Young* doctrine to a claim brought by an Indian tribe for injunctive relief against continuing state regulation of lands to which the tribe claimed title. In their suit, the members of the Indian tribe requested injunctive relief that would bar the State's principal officers from controlling certain disputed lands and waters. *Id.* at __, 117 S. Ct. at 2040.

Writing for the Court, Justice Kennedy explained that an interpretation of *Young* that would allow "federal court-action to proceed in every case where prospective declaratory and injunctive relief is sought . . . would be to adhere to an empty formalism. . ." *Id.* at __, 117 S. Ct. at 2034. In a section of the opinion joined only by Chief Justice Rehnquist, Justice Kennedy introduced a sort of balancing test that courts should use to determine where the *Young* doctrine applies. First, courts should determine whether there is an available state forum for vindicating federal interests. *Id.* at __, 117 S. Ct. at 2035. In situations where there is no state forum available, the *Young* rule takes on a "special significance." *Id.* Second, courts should consider whether the case in question requires interpretation of federal law. *Id.* at __, 117 S. Ct. at 2036. According to this new balancing test, review must occur on a case-by-case basis in order to determine whether the presumption in favor of federal court jurisdiction controls. *Id.* at __, 117 S. Ct. at 2038. *But see Id.* at __, 117 S. Ct. at 2047 (O'Connor J., concurring in part, joined by Scalia, J. and Thomas, J.) (arguing that the appropriate review under *Young* remains "a straightforward inquiry into whether a complaint alleges an ongoing violation

of federal law and seeks relief properly characterized as prospective").

Justice Kennedy, writing for a majority of the court, concluded that the Indian tribe's suit was barred by the Eleventh Amendment. *Id.* at __, 117 S. Ct. at 2043. Although the suit could be viewed as one seeking prospective relief, the case presents "special circumstances" where "[t]he dignity and status of statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case." *Id.*

Analysis of the present case in the context of the Court's decision in *Coeur d'Alene* thus requires an examination of whether there no state forum is available and whether the case involves interpretation federal law. The answer to both of these questions is yes. As discussed in Part I of this opinion, the Telecommunications Act makes clear that the interconnection agreements in question are exclusively reviewable in federal court under Section 252(3)(6). The Act further provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement." 42 U.S.C. § 252(e)(4) (1998). The Eighth Circuit recently affirmed this interpretation of the Act, finding that Section 252(3)(6) outlines the "exclusive means to attain review of state commission determinations under the Act." *Iowa Utilities Bd.*, 120 F.3d at 803.

Furthermore, the issues at hand clearly concern interpretation of federal law. The issues under review in the present cases are not as central to sovereign immunity as the issues presented in *Coeur d'Alene.* Indeed, in *Coeur d'Alene* the

issue the Tribe asked the federal court to review was that State's control over lands and waters "long deemed by the State to be an integral part of its territory." *Coeur d'Alene*, __ at __, 117 S. Ct. at 2040. In sharp contrast, the plaintiffs in the cases currently under consideration merely ask the federal court to review the interconnection agreements to determine whether they comply with a federal law. Clearly, the issues of sovereign immunity presented by review of state actions taken pursuant to the Telecommunications Act are not nearly as compelling as those presented by the state of Idaho in the dispute over lands that it has historically considered a part of its territory.

Thus, although the court in *Coeur d'Alene* has created a new exception to the traditional conception of the *Young* doctrine, this exception is narrow and does not preclude application of the doctrine to the present cases.

5. Conclusion

As far as this court is aware, all of the other courts that have examined this issue to date have found that individual directors may be subject to liability under the doctrine of *Ex parte Young*. *See, e.g., Thoms*, slip op. at 4 ("*Ex parte Young* allows this suit to proceed against the Board members in their official capacities."); *Reinbold*, slip op. at 7 ("The Eleventh Amendment is not a bar to U.S. West's suit against the individual PSC members for prospective relief."); *Tennessee Regulatory*, slip op. at 13 ("[T]he court is convinced that the principles of *Ex parte Young* permit an action against the TRA directors."); *AT&T v. BellSouth*, slip op. at 13 (terming the action brought under Section 252 of the Act a

"garden variety" application of the doctrine of *Ex parte Young*).

This court concludes that the doctrine of *Ex parte Young* allows these four suits (and counterclaim) to proceed against the Commissioners in their official capacities because they involve ongoing violations of federal law and seek prospective relief. The plaintiffs in these cases do not seek money damages from the state, which is the traditional basis for Eleventh Amendment concern. Rather, the plaintiffs asks the court to review the interconnection agreements so that they will comply with federal law on an ongoing basis. Furthermore, the modifications of the *Ex parte Young* doctrine introduced in *Coeur d'Alene* do not alter this court's findings that the plaintiffs' claims fall within the doctrine of *Ex parte Young* because the plaintiffs' claims involve an interpretation of federal law, there is no available state forum, and the plaintiffs' claims do not threaten a central tenant of sovereignty.

### C. CONGRESS DID NOT INTEND FOR STATES TO BE PARTIES IN FEDERAL DISTRICT COURT

The defendants' final argument that they should not be required to be a party to the suits in question is that "[a]s a matter of statutory interpretation, Congress did not intend for state commissions that participate in Section 252 to be parties in federal court." Reply Mem. at 8-9, filed in *Illinois Bell v. Miller,* Case No. 97 C 8285. *See also* Reply Mem. at 7-9, filed in *MCI v. Illinois Bell,* Case No. 97 C 2225. According to the defendants' theory, Section 252 of the Act demonstrates that Congress only intended for the *agreement* itself to be reviewable in federal court, not the state commissions'

actions. Reply Mem. at 10, filed in *Illinois Bell v. Miller*, Case No. 97 C 8285.

In making their argument, the defendants point to the fact that Section 252(e)(4) uses the word "actions," ("No State court shall have jurisdiction to review the *action* of a State commission in approving or rejecting an agreement") (emphasis added), whereas Section 252(e)(6) uses the word "agreement," ("Any party aggrieved by [the state commission's determination] . . . may bring an action in an appropriate Federal district court to determine whether the *agreement* or statement meets the requirements of [the Act].") (emphasis added). Accordingly, the defendants conclude, "Section 252(e)(6) evinces a recognition by Congress of the State's sovereignty." *Id.* at 11.

The ICC's and Commissioner's analysis of Congress's intent evades logic. Not surprisingly, the defendants are unable to point to any legislative history that would support their argument that Congress did not intend the state to be a party to a federal court's review of the agreement. While it is true that the language of the Act provides that the federal court may review the "agreement" to see if it complies with the Act, it does not in any way recognize that the state is immune from defending such suits. In fact, the very section that provides for exclusive review of the agreements in federal courts is entitled "Review of State Commissions *Actions*." 42 U.S.C. § 252(e)(6) (emphasis added). If the state agencies elect to participate in the federal regulatory scheme, they are subject to the direction of the Congress and the federal courts in carrying out their roles.

## IV. CONCLUSION

This court finds that the ICC and the Commissioners have waived any claim to immunity by voluntarily participating in the regulatory scheme outlined in the Telecommunications Act. Furthermore, as to the Commissioners, this court finds that the doctrine of *Ex parte Young* provides an independent basis of liability.

WHEREFORE, the defendants ICC's and Commissioners' motions to dismiss the plaintiffs complaint on the basis of Eleventh Amendment immunity are DENIED in *MCI v. Illinois Bell Telephone,* Case No 97 C 2225; *AT&T v. Illinois Bell Telephone,* Case No. 97 C 0886; and *Illinois Bell Telephone v. Dan Miller, et al.,* Case No 97 C 8285. The parties in *MCI v. Central Telephone,* Case No. 97 C 4096, are ordered bound by the court's ruling in this memorandum opinion. In addition, the defendants ICC's and Commissioners' motion to dismiss the counterclaim of defendant Illinois Bell Telephone Company d/b/a Ameritech Illinois filed in *MCI v. Illinois Bell Telephone,* Case No. 97 C 2225, is DENIED.

Enter:

_____

David H. Coar
United States District Judge

Dated: March 30, 1998

## APPENDIX D – CONSTITUTIONAL PROVISIONS AND STATUTES

### CONSTITUTIONAL PROVISIONS

1. The Commerce Clause, U.S. art. I, § 8 cl. 3

> The Congress shall have Power…to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

2. The Spending Clause, U.S. art, I, § 8 cl. 1

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

3. The Supremacy Clause, U.S. art. VI, cl. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

4. U.S. Const amend. XI

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the

United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

## STATUTES

## FROM TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS CHAPTER 5. WIRE OR RADIO COMMUNICATION GENERAL PROVISIONS

### § 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation.

(1) Voluntary negotiations. Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation. Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate

in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration.

(1) Arbitration. During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner.

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on

which the State commission receives the petition.

(3) Opportunity to respond. A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission.

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unre-

solved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate. The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration. In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards.

(1) Interconnection and network element charges. Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section --

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic.

(A) In general. For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless-

(i) such terms and conditions provide for the mutual and reciprocal recov-

ery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction. This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services. For the purposes of section

251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

* * *

(e) Approval by State commission.

(1) Approval required. Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

* * *

(2) Grounds for rejection. The State commission may only reject--

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that--

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority. Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision. If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to re-

view the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act. If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions. In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

* * *

(f) Statements of generally available terms.

(1) In general. A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.

(2) State commission review. A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review. The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an

extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review. Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected. The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

* * *

(g) Consolidation of State proceedings. Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act.

(h) Filing required. A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers. A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier. For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h).

**Section 601 of the Telecommunications Act of 1996:**

SEC. 601. APPLICABILITY OF CONSENT DECREES AND OTHER LAW.

* * * *

(c) FEDERAL, STATE, AND LOCAL LAW.—

(1) NO IMPLIED EFFECT.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.